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To 3

REPORTS
OF CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE

FOR THE
WESTERN DIVISION,
April Term, 1900;

FOR THE
EASTERN DIVISION,
September Term, 1900.

GEORGE W. PICKLE,
ATTORNEY-GENERAL AND REPORTER.

VOLUME XXI.

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Rec. Apr. 9, 1901.

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

WESTERN DIVISION.

JACKSON, APRIL TERM, 1900.

THE J. M. JAMES CO. v. BANK.

(*Jackson.* June 6, 1900.)

1. LIMITATIONS, STATUTE OF. *Of six months not applicable.*

The statute which prescribes a six months limitation for "actions for slanderous words spoken," has no application to an action for injury resulting to plaintiff's credit from the wrongful act of a banker in refusing to pay the check of a customer who had an ample deposit to meet it. Said statute, as its terms import, applies to actions for injurious words and not to actions for injurious acts. (*Post*, pp. 7-12.)

Code construed: § 4468 (S.); § 3468 (M. & V.); § 2771 (T. & S.).

Case cited: *Harrison v. Burem*, 1 Shan. Cases, 94.

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2. **DECLARATION.** *Averment of special damage unnecessary, when.*

Under a declaration which avers that the plaintiff, a trader engaged in the mercantile business, was injured by the wrongful act of his banker in failing and refusing to pay checks drawn upon an ample deposit, there may be a recovery of substantial damages without any averment or proof of special damages. The averment that "plaintiff is a trader," if supported by proof, entitles him, in such case, to substantial damages. (*Post*, pp. 12, 13.)

3. **SAME.** *Negative averments not required, when.*

In an action against a banker for injury resulting to plaintiff's credit from a banker's wrongful refusal to pay his check, out of an ample deposit, it is not essential for plaintiff to aver that defendant did not have a lien on the deposit for indebtedness due to himself, as such fact, if it exists, is matter of defense. (*Post*, pp. 13, 14.)

4. **EVIDENCE.** *Of special damages not admissible without averment thereof.*

Unless same is averred as special damages, it is not competent for plaintiff to prove the loss of the patronage or confidence of particular persons, in an action by a trader to recover of a banker for injury resulting to the former's credit from the wrongful refusal of the latter to pay checks drawn upon a deposit amply sufficient to meet them. (*Post*, p. 14.)

Case cited: *Bank v. Bowdre*, 92 Tenn., 724.

5. **SAME.** *General impairment of credit admissible without specific averment.*

But, in such case, it is competent to prove general impairment of the plaintiff's credit by the defendant's wrongful dishonor of plaintiff's checks, without specific averment of that fact. (*Post*, pp. 14, 15.)

6. **CHARGE OF COURT.** *As to damages, erroneous.*

In an action by a trader against a bank for injury to plaintiff's credit by the defendant's wrongful dishonor of checks drawn upon an ample deposit, the law conclusively presumes damage from proof of the relation of the parties and wrongful dishonor of plaintiff's checks, and it is error for the court to charge that the jury must, in addition, ascertain how plaintiff was damaged by defendant's act. The court should have instructed the jury that, if the facts as to the relation of the

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parties and the dishonor of the checks were as averred, the law conclusively presumed damages, and that their sole remaining duty was to ascertain the amount. (*Post*, p. 15.)

Case cited: *Bank v. Bowdre*, 92 Tenn., 724.

7. SAME. *Same.*

In an action by a trader to recover damages of a banker for injuring his credit by a wrongful refusal to pay his checks, out of an ample deposit, it is error for the Court, in its charge, to confine the damages recoverable by plaintiff to such as he may have sustained with the particular persons in whose favor the checks were drawn. The plaintiff is entitled, in such case, to recover the entire damages legitimately resulting to his credit and business from defendant's wrongful act. (*Post*, pp. 15, 16.)

8. SAME. *Misleading and erroneous, when.*

In an action against a bank for injury to a depositor's credit, resulting from the bank's wrongful refusal to pay checks out of an ample deposit, it is error for the court to instruct the jury, in the absence of any proof to justify it, in regard to the distinction between the absolute refusal of the bank to pay the checks and its request for a reasonable delay to examine the state of the depositor's account. (*Post*, pp. 16, 17.)

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FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

THOS. H. JACKSON and H. C. WARRINER for
The J. M. James Co.

METCALF & METCALF for Bank.

BEARD, J. The J. M. James Company, a mercantile firm in Memphis, was, on the 19th day

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of March, 1897, a customer and depositor with the defendant bank. On that day it drew several checks in favor of different payees on this bank, which were presented the following day for payment. When so presented payment was refused, and their respective holders were notified of the fact. Subsequently this action of the bank was reconsidered, and the checks were recalled and paid. On April 12, 1898, the present suit was instituted. The declaration of the plaintiff contained five counts, substantially as follows:

(1) That the plaintiff was, and had been, engaged as a trader in the mercantile and commission business in Memphis for several years prior to March 19, 1897, and a customer of and depositor with the defendant bank, and that on that day, and for several days prior and subsequent thereto, it had on deposit with the defendant \$3,212.46, subject to plaintiff's checks; that on said day it drew several checks on defendant bank, as follows: One in favor of W. W. James for \$500, one in favor of W. H. Cousins for \$54.51, one in favor of W. H. Cousins for \$2,251.76, and one in favor of the Memphis National Bank for \$250; that said checks were presented on the following day, March 20, 1897, to the defendant bank for payment, whereupon defendant refused to pay said checks, and they were thereby dishonored, and that such refusal was wrongful on defendant's part, and a breach of its contract with

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plaintiff, and plaintiff has suffered great injury therefrom. Wherefore plaintiff has been damaged in the sum of \$75,000 and sues.

(2) After repeating the language of the first count, the second count alleged:

"The refusal and failure of defendant to pay said checks when it had on deposit more than a sufficiency of money to pay them, deposited with it by plaintiff, was wrongful, wilful, and malicious, and plaintiff has suffered great injury therefrom. Wherefore the plaintiff has been damaged in the sum of \$75,000, and sues."

(3) After repeating as in the last count, the third count alleged:

"The refusal and failure to pay said checks when it had on deposit more than a sufficiency of money to pay, then deposited by plaintiff with defendant, as aforesaid, was wrongful, wilful, and malicious, and was done with the intention and purpose on the part of the defendant to injure plaintiff in its credit, business, and reputation; and plaintiff avers that it has been injured in its credit, business, and reputation by the damage thereof, and has suffered to the extent of \$75,000. Wherefore plaintiff sues."

(4) After averring as in the former counts, the fourth count alleged:

"This failure and refusal on the part of defendant to pay said checks was wrongful, and a breach of its contract with plaintiff; and plaintiff

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averts that it has been injured greatly thereby—its credit has been injured, its reputation hurt, and plaintiff has, in consequence of defendant's said breach of contract, lost many of its customers, and has been unable to obtain the credit necessary to conduct its business successfully. Hence plaintiff avers that it has suffered damages to the extent of \$75,000, for which it sues defendant."

(5) After averring as in the former counts, and that plaintiff was doing business in the State of Arkansas, Mississippi, and Tennessee, and that it possessed the confidence of the business public in its integrity and fair dealing, said fifth count alleged:

"This failure and refusal on the part of the defendant to pay said checks was wrongful, willful, and malicious, and was done with the intention and purpose on the part of the defendant to injure plaintiff in its credit, business, and reputation. The plaintiff further avers that it has been greatly injured and wronged in its credit, business, and reputation; that by said wrong inflicted on it by defendant, plaintiff's credit has been impaired, its business reputation hurt, and as a consequence thereof it has lost many of its customers, and has been unable to obtain the credit necessary to conduct its business successfully. Hence plaintiff avers that it has been damaged to the extent of \$75,000, for which it brings this suit."

The defendant demurred to all five of the counts.

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The Court below sustained the demurrer to the last four of the counts, and overruled it as to the first, upon which, and a plea to it, the case was tried, resulting in a verdict of one dollar for the plaintiff. A new trial having been refused, an appeal in the nature of a writ of error has been prosecuted to this Court by the plaintiff below. Many errors are assigned for reversal of the cause.

The record is also before us upon a writ of error sued out by the defendant bank, which assigns error to the action of the trial Judge in overruling its demurrer to the first count.

One of the contentions presented by the demurrer was that all the counts of plaintiff's declaration were laid in tort to recover damages for slander to the reputation and credit of the plaintiff, and that the suit was barred by the statute of limitations of six months. This somewhat novel view was adopted by the trial Judge as to the last four counts, and as to them this ground of demurrer was sustained, but overruled as to the first, the Court holding, as we assume, that this count was one *ex contractu*. It is with great earnestness argued by the defendant bank that as to these four counts this is a sound view, and that the judgment of the lower Court in this regard should be maintained.

The statute of limitation relied on by the demurrant, and applied by the trial Court to the

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counts in question, is in these words: "Actions for slanderous words spoken shall be commenced within six months after the words spoken." Code (Shannon's), § 4468.

It would seem as if it would have been difficult for the Legislature to choose words which would more clearly exclude such an action as the present one from the operation of this section, or more apt to embrace alone an action for slander as this offense is defined by the textbooks, the reported cases, and by standard lexicographers, both law and literary. All these substantially agree in defining slander as the speaking of base and defamatory words which tend to the prejudice of the reputation, office, trade, business, or means of getting a living of another. Cooley on Torts, pp. 229, 235; Newell on S. & L., 40; Townsend on Sl. and L., Sec. 3; Rapalje's Law Dic., 1198; 3 Bl., 183; *Pollard v. Lyon*, 91 U. S., 225; *Harrison v. Burem*, 1 Shannon's Tenn. Cases, 94; Webs. Internat. Dict.

But it is urged that slander may be perpetrated by an act or deed, and that when a banker wrongfully rejects his depositor's check as is charged in these counts, he slanders his business reputation and credit as much so as if he had defamed him in uttered words; that in such case it is the "act speaking," thus bringing the case within the terms of the statute. It is true we often say "actions speak," as in the homely adage

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“actions speak louder than words,” but this is a mere figure of speech, and by it is meant that the acts or deeds of one convey to others more distinct impressions than mere words, and frequently contradict the latter. But the Legislature was not, in passing this statute, refining upon the term “slander.” An act may in the sense indicated “speak,” but it has no articulate voice, and it is the slander so uttered—that is, by spoken words—which is in the spirit and letter of this section.

We have examined the authorities relied on by demurrant to sustain the trial Judge in the conclusion reached by him that these were counts in slander within the terms of this section, and by it barred because the suit was brought more than six months after the utterance of the slander, and we can discover in them no support for the contention of demurrant.

Before referring to them it is well to say that in none of the works on libel and slander accessible to us have their authors included what is called by the counsel for demurrant slander by deed or act; slander by spoken words is uniformly the subject of their text. In fact Mr. Odgers, in the introduction to his work on Libel and Slander, p. 7, says: “A man’s reputation also may be injured by the deed or action of another, without his using any words, and for which injury he has an action on the case, but such

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cases are not within the scope of the present treatise." Among the illustrations of such an actionable injury, but yet outside the limits of a work on slander, the author gives that of "a banker having in his hands sufficient funds belonging to his customer and dishonor his check." Cited to this text are the cases of *Marzetti v. Williams*, 1 B. & Ad., 415, and *Rollin v. Steward*, 14 C. B., 595, and while they support it they give no color to the present insistence that this act of the banker is slander, either in its technical or common acceptation. On the contrary, Williams, J., in the last mentioned case, says that such an action is like an action of slander brought by a trader as such for an imputation of insolvency, so far as the right to recover in damages is concerned, thus by implication negating the idea that it was an action of slander.

Upon the basis of the analogy thus suggested between the two actions, as to the right and measure of recovery of damages, rests whatever there may be misleading in the later authorities. Mr. Cooley, in his work on Torts, in note to the text on page 203, says: "It is a species of slander of credit for a bank to refuse to honor the check of his customer who has money on deposit subject to call," citing to his note these two English cases. This is also true as to a footnote found on page 58 of Townsend on Slander.

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The only case, which the industry of counsel for the demurrant has been able to bring to our attention, which gives any support to his contention, is that of *Svendeson v. State Bank*, 64 Minn., 40 (S. C., 58 A. S. R., 523). This, like the two cases already referred to, was an action by a trader against a bank to recover damages for dishonoring his check when it had ample funds of the depositor to meet it. In dealing with the question of the right to substantial damages, the Court said: "The case of *Patterson v. Marine National Bank*, 130 Pa. St., 419, seems to place the right to recover more than nominal damages in such a case on the ground of public policy, but the other cases place it rather on the ground that the wrongful act of the banker in refusing to honor the check imputes insolvency, dishonesty, or bad faith to the drawer of the check, and has the effect of slandering the trader in his business. To refuse to honor his check is a most effectual way of slandering him in his trade, and it is well settled that to impute insolvency to a merchant is actionable *per se*, and general damages may be recovered for such slander."

It is apparent, however, that the Court was not treating the case in hand as an action for slander, but was dealing with the act of the bank, that was just as effectual in imputing dishonesty or insolvency to its customer, as if either had been charged against him by word of mouth, and

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in the analogy between the cases found a ground common to both for substantial damages.

This same analogy is pointed out in *Shaffner v. Ehrman*, 139 Ill., 109 (S. C., 32 A. S. R., 192; 15 L. R. A., 134); *Bank of Commerce v. Goos*, 39 Neb., 437 (S. C., 23 L. R. A., 190); and *Atlanta National Bank v. Davis*, 96 Ga., 334 (S. C., 51 A. S. R., 139). These cases, like the others, are dealing with the question of damages properly recoverable upon the mere averment, without more, that the plaintiff was a trader, and all agree that in such a case he should be awarded temperate but substantial damages, for in such a case "it is as in cases of libel and slander, which description of suit it closely resembles, inasmuch as it is a practical slur upon the plaintiff's credit and repute in the business world." *Atlanta National Bank v. Davis*, supra. We think there can be no doubt the trial Judge fell into serious error in treating these counts as counts in slander, and holding them barred by the statute of limitation of six months.

He was equally guilty of error in sustaining the defendant's first ground of demurrer to the second count of the declaration. This count has already been set out. It is in tort. It was a count for a breach of duty growing out of the implied contract of the bank to honor plaintiff's checks, as long as he had money to his credit. It was a count *ex delicto*. *Junker v. Hobes*, 45 Fed. Rep.,

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§40. It alleged that plaintiff was a trader, and as such engaged "in the mercantile or commission business in the city of Memphis," but, as may be seen, avers no special damage as the result of the defendant's wrongful conduct. The ground of demurrer referred to is that its failure to allege special damages was fatal.

The authorities are uniform that the averment that "plaintiff is a trader" is sufficient, and he is entitled in such a case to recover substantial damages, though special damage is not alleged. *Rollin v. Steward*, supra; *Patterson v. Marine National Bank*, supra; *Atlanta National Bank v. Davis*, supra. And in *Shaffner v. Ehrman*, supra, it is held that the averment, "plaintiff is a trader," supplies the lack of allegations that he suffered special damage, or that the defendant acted out of malice in dishonoring his check.

The assignments of error taken by plaintiff below to the action of the Court in the two particulars just mentioned are therefore well taken.

Again, the trial Judge was in error in sustaining the following ground of demurrer, to wit: "The defendant demurs for this: The plaintiff fails to aver that the bank did not have a lien on said moneys which were on deposit as alleged, for an indebtedness due by plaintiff to defendant." It is clear that if such lien existed it was a matter of defense to be brought forward by plea; there is no rule of correct pleading which re-

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quired the plaintiff to negative it in its declaration.

Error is assigned upon the action of the trial Court in rejecting the testimony of one John Cousins that prior to the dishonor of the checks in question he frequently induced his patrons to send their cotton to the house of plaintiff in error, but that after this time he ceased to do so; and also that having lost confidence in plaintiff in error, by reason of this dishonor, he did not send his own cotton.

This testimony was properly rejected. In an action of slander by a trader for defamatory words spoken of him in the way of his trade, no averment of special damage is necessary, because the words are actionable *per se*. *Bank v. Bowdre*, 92 Tenn., 724; and in the absence of such averment evidence of general loss of business is always admissible, for this is not special damage. But the plaintiff cannot show that particular persons have ceased to deal with him, unless the loss of their custom is set out in the pleadings as special damage. For it is right that the defendant should be furnished with their names before trial. *Odgers on Libel and Slander*, p. 318; *Townsend on Slander and Libel*, Sec. 345. There is such analogy between the present action and one for slander of a trader, that it is evident the same rule is applicable.

On the other hand, the testimony of Stratton,

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the secretary of the plaintiff company, showing the general impairment of the credit by the dishonor of these checks, was within the rule of competency, and was improperly excluded from the jury.

In his summary of the material points which the plaintiff must establish in order to recover, the Court said to the jury: "It (the company) must satisfy you that it was damaged by the refusal of the bank to pay its checks, and how it was damaged, and the amount of the same, where it was subject to definite proof."

This was error. Having averred and proved that it was a trader, and that its checks were dishonored wrongfully by the bank, the law conclusively presumed that the plaintiff had sustained damages, which it was the duty of the jury under proper instructions to fix. *Shaffner v. Ehrman*, supra; *Bank v. Goos*, supra; *Robin v. Steward*, supra; *Bank v. Bowdre*, supra.

The trial Judge was also in error in the following instruction: "Under the law of this case the only damage that can be considered by the jury is the damage to the credit of the J. M. James Company with the persons or corporations to whom they gave the checks as established by the evidence."

It is evident that this narrow limitation upon the right of recovery by the plaintiff was in the face of the authorities already referred to. The

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rejection by a bank of a check drawn upon it by a customer brings discredit to the drawer, not only with the person presenting it, but necessarily with all persons who are informed of the fact. And if this customer is a merchant, or trader, its natural effect is an injury to his business standing as far as the knowledge of the fact extends, for which he is entitled to substantial, though temperate, damages measured by all the facts in the case.

The Court below was further in error in the following instruction: "If the evidence establishes the fact that there was no absolute refusal to pay said checks, but only a request for delay to look into the condition of the J. M. James Company's account, you will determine from the evidence whether the request was reasonable or was unreasonable, under the facts and circumstances proven. If the request was reasonable, then you will determine whether the delay was reasonable or unreasonable. If you find it to be reasonable, then there can be no recovery in this case. If the request was unreasonable, or the delay was unreasonable in making an investigation of the account of the J. M. James Company, then there can be recovery in this case."

Upon this record it was the duty of the bank to honor these checks on presentation. No excuse was offered in the Court below for a failure to do so. No request for an opportunity to examine

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the account of this company is shown. There is no pretense that time was needed for examination of the account. In truth the record discloses that when presented to the bank's teller he was at once informed that the company had to its credit funds to make them good. In view of these facts, and the additional fact that they were paid after several hours delay, this instruction could not have been otherwise than misleading to the jury and prejudicial to the plaintiff.

The judgment of the Circuit Court is reversed, and the cause is remanded.

Falls v. Building and Loan Association.

FALLS v. BUILDING AND LOAN ASSOCIATION.

(*Jackson*. June 6, 1900.)

1. BUILDING AND LOAN ASSOCIATIONS. *Waiver of objection to stockholder's bill to wind up.*

The objection that a stockholder's bill to wind up a building and loan association does not aver that the complainant had first made application to the Treasurer of the State, as required by Acts 1897, Ch. 126, is waived unless it is made by demurrer. This objection cannot be made by the association after answer, and for the first time on the hearing in this Court, to reverse the Chancellor's action in sustaining the bill as a general creditor's bill and appointing a receiver of the company's assets. (*Post*, pp. 23-25.)

Act construed: Acts 1897, Ch. 126.

Code construed: § 6131 (S.); § 5064 (M. & V.); § 4321 (T. & S.).

Cases cited: *Lowe v. Morris*, 4 Sneed, 69; *Brazelton v. Brooks*, 2 Head, 193; *Stockley v. Rowley*, 2 Head, 492; *Lowry v. Naff*, 4 Cold., 370; *Vincent v. Vincent*, 1 Heis., 333.

2. SAME. *Same.*

The objection that a stockholder's bill to wind up a building and loan association does not aver that complainant had first made an effort to obtain relief through corporate action, is waived unless made by demurrer. (*Post*, p. 25.)

Case cited: *Boyd v. Sims*, 87 Tenn., 771.

3. SAME. *Cannot complain of erroneous appointment of receiver, when.*

Although a building and loan association has been improperly placed in the hands of a receiver under a general creditor's bill, filed by one of its stockholders, every allegation of which was denied by its answer, still this Court will not reverse the Chancellor's erroneous action where all of the stockholders have become parties and acquiesce in the Chancellor's action and the association alone appeals and complains of the decree below. The association is only the trustee of its stockholders, and if the beneficiaries submit, the trustee cannot complain. (*Post*, pp. 25, 26.)

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4. SAME. *Stockholder's bill sustained, when.*

A general creditor's bill to wind up a building and loan association, that had ceased to do business, filed by a stockholder, claiming to be a creditor also, will be sustained, although it may turn out on the hearing that complainant is a debtor instead of a creditor. He can maintain the bill in his character of stockholder. Besides, the bill having been filed on behalf of all parties in interest, became the common suit of all who came in by petition and gave cost bonds. (*Post*, pp. 26, 27.)

5. SAME. *Amount due upon death of a member.*

The personal representative of a deceased stockholder of a building and loan association is entitled by statute to the full amount paid in by the deceased and any profits which have been realized; in other words, to the full value of the stock at the date of the death. (*Post*, p. 27.)

Code construed: § 2135 (S.); § 1750 (M. & V.).

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

PIERSON & EWING for Falls.

MALONE & MALONE, JAS. M. GREER, and GANTT
& PATTERSON for Building and Loan Association.

BEARD, J. The complainant is a shareholder in the defendant building and loan association, a corporation organized under Chapter 142 of the Acts of 1875 to carry on the business which its name indicates. Several years before the institu-

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tion of this suit a loan was obtained from the association on the shares of stock now held by the complainant, and to secure it in the monthly payment of dues and interest by the shareholder, until the accumulation of interest and profits apportionable to these shares should equal their face value, a mortgage on real estate was executed. Many payments were made in discharge of this obligation by her predecessor in title and by complainant.

Under the charter and by-laws of the association the loan of a borrowing shareholder was fully discharged when, through this accumulation, the shares of stock had matured or reached the face value, and such shareholder was then entitled to have a release of the mortgage security given for the loan. Complainant in her bill alleged the maturity of her shares of stock, and that upon a fair adjustment of her account with the association, she not only was entitled, at the date of the filing of this bill, to a satisfaction of the mortgage on her property, but to a balance due from the association to her, as to which she claimed to stand in a creditor's relation to it. The bill alleged that on making a recent demand upon the party having charge of the affairs of the association for a release of her property, the demand was denied, and a claim was made that she was still indebted on this loan in the sum

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of \$909.55. This claim is averred to be unauthorized and oppressive.

It is further alleged that for many months before the filing of this bill the association had made no loans, nor had done any other business peculiar to such an organization; that while thus having ceased all active operation it still maintained a mere form of life, at a considerable expense, the burden of which fell upon herself and other shareholders of the association without any corresponding profit to them. Much mismanagement and abuse of their trusts by the officers of the association is charged in the bill. Among other evidences of this violation of their trust obligations it is alleged that they had turned over to an irresponsible committee all corporate assets, to be managed as its members might deem best, and that thus having first ceased all building and loan business, the board of directors had then abandoned their duty and sought to delegate their power to this unauthorized body. In view of all this, complainant, filing her bill both as an alleged creditor and as a shareholder, prayed that it be taken as a bill filed in the interest of creditors and shareholders and so adjudged; that a receiver be appointed, and that the association be wound up under the order of the Chancery Court, and the rights of all parties in interest be established by proper decree.

This bill was answered by the association, and

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by those of its officers and directors who were made defendants with it. This answer denied seriatim every material allegation of the bill, and then gave an elaborate history of the operations of the association. It denied that complainant was a creditor. It protested against the Court taking charge of its affairs and placing them in the hands of a receiver, insisting that such a course would bring insolvency to a then solvent institution.

Upon these pleadings the Chancellor adjudged the bill to be a general creditors' bill, directed the Clerk and Master to give notice by publication to creditors and shareholders of the pendency of the suit, requiring them to make themselves parties to it and set up their claims therein. He also appointed a receiver and placed him in charge of all the books and other assets of the corporation.

Publication was made as directed, and from time to time all persons interested filed petitions setting up their respective claims, and, upon executing satisfactory cost bonds, were made parties to the cause. Much evidence was taken, and finally there was a reference to the Clerk and Master, who was ordered to state an account, showing the condition of the association and the rights and relations of all parties in interest. This was done. A full report was made answering in detail every matter covered by the refer-

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ence. Among other findings the Clerk reported that the complainant, instead of being a creditor of the association, was to a large amount its debtor. This report was, with immaterial changes, ultimately confirmed by the Chancellor. From his decree of confirmation, as well as from the interlocutory order adjudging the present bill a general creditors' bill, and that the association should be wound up under the direction of the Court, and appointing a receiver, the Anglo-Teutonia Building and Loan Association has appealed. The complainant has also perfected an appeal from the decree confirming, over her exceptions, certain portions of the report of the Clerk and Master.

We will first dispose of the assignments of error made by the defendant association. Those most earnestly pressed are directed to the action of the Chancellor in entering the interlocutory order above referred to.

It is said that this order was improperly entered, because of fatal omissions in complainant's bill, and that this error should have been corrected by a dismissal of the cause at the hearing.

By Chapter 126 of the Acts of 1897 the Legislature of Tennessee, in amending the Building and Loan Association Act of 1875, provided that whenever a stockholder became dissatisfied with the management of the affairs of the corporation by its board of directors and officers, such stockholder should apply to the Treasurer of the State

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for an examination into the affairs of the association, and a correction of the same by him. It further provided that no such suit should be instituted by a stockholder of a building and loan association without having first made this application to the Treasurer.

This amendatory act, in the particulars indicated above, was passed to protect these associations from captious and vexatious litigation instituted by dissatisfied shareholders. By it the Legislature intended to provide a shield against such litigants, but it was not its purpose to compel its use. In a suit like the present, brought by a complaining stockholder, the defendant association might insist upon a strict compliance with the terms of this amendment, and an averment in the bill to that effect before being dragged into the Courts for investigation; but yet if it did not see proper to avail itself of the protection thus afforded, but submitted itself to the jurisdiction of the Court, then, in a case calling for equitable relief, this would be given. For the lack of an allegation that a shareholder had pursued the course required by the statute, in a case falling within it, his bill would be dismissed upon a demurrer directed to this omission. But this defect could be reached in no other way. An answer is a waiver, and is, in effect, an implied agreement upon the part of the defendant to submit the merits of the controversy to the Court. Code (Shannon's) § 6131;

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Lowe v. Morris, 4 Sneed, 69; *Brazleton v. Brooks*, 2 Head, 193; *Stockley v. Rowley, Id.*, 492; *Lowry v. Naff*, 4 Cold., 370; *Vincent v. Vincent*, 1 Heis., 333.

This is what was done in this case. Instead of demurring, a carefully prepared answer was filed, and the present objection is made for the first time in this Court. It comes too late.

It is further insisted that the bill was vitally defective, because of its failure to allege that the complainant had exhausted every effort within the corporation to right the wrongs against which she sought relief, before bringing her suit. *Boyd v. Sims*, 87 Tenn., 771. The answer fatal to the first contention, is equally so to this.

But independent of these considerations, it is said great wrong was done to the association by the Chancellor, who, without evidence of mismanagement on the part of its officers, and in spite of its answer denying every material averment of the bill, took charge of its affairs and placed its assets in the hands of a receiver.

It might be conceded to the counsel of the association that upon the record as it then stood this action of the Chancellor was possibly erroneous. But even if error, it cannot now be corrected at the instance of the corporation. The record shows, in answer to the notice of the pendency of this bill as being filed for the benefit of all interested, every shareholder of the as-

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sociation has made himself a party to these proceedings, and by petition has asked to have his rights established and protected by proper decree. This has been done, and these beneficiaries are not now complaining.

This appeal is prosecuted by the Anglo-Teutonia Building and Loan Association *co nomine*.

While in contemplation of law the property and rights of a chartered association belong to the corporation as an entity, the stockholders are the real parties in interest. 1 Mor. on Pri. Cor., Sec. 237. The artificial body is but the representative of its stockholders, and exists mainly for their benefit. *Sawyer v. Hoag*, 17 Wall., 610. So the beneficiaries of the trust, the real parties in interest, having taken the benefit of this litigation, and making no complaint of what has been done, their trustee having no independent interest, cannot be permitted to intervene between them and the decrees.

Again, it is insisted the bill should be dismissed, because, upon stating the account, it develops that complainant is a debtor and not a creditor of the association. To this two answers may be made. First, the bill of complainant was that of a shareholder claiming by an excess of payments to be also a creditor; second, that having been filed in the interest of all parties interested in the corporation, the cause has become one in common to all who, coming in by petition and executing

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cost bonds, have had themselves made parties to it. Story's Eq. Pl., 5, 99; *Vance v. Sanders*, 8 Bax., 299; Waite on Ac. and Def., Vol. 2, p. 420; Eng. & Am. Enc. Pl. and Pr., Vol. 5, pp. 554, 555; *Idem*, Vol. 6, pp. 853-986, Sec. 11; *Austin v. Cochran*, 3 Bland (Md.), 341; *Johnson v. Hammerly*, 24 Beavan, 498.

Two errors are assigned by complainant. The first is as to the allowance to the administrator of the estate of Gamrie C. New, deceased. New, in his lifetime, was a nonborrowing shareholder in this association. His monthly dues on his shares of stock were paid to his death. This corporation was organized under the general corporation Act of 1875. A section of that Act, carried into the Code (Shannon's), § 2135, is as follows: "The personal representatives, upon the death of a stockholder, shall be entitled to receive the full amount paid in by the deceased, and any profits which have been realized."

The full value of this stock at the time of New's death was allowed by the Clerk and Master and decreed by the Chancellor. There was no error in this. This was in exact accord with the statute.

The second error assigned was as to an allowance of two hundred and fifty dollars to Mr. Hirsch, for services rendered by him to the association before the appointment of the receiver.

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This allowance was proper. His services were valuable, and the allowance was reasonable.

The receiver also appealed and assigns errors. The Clerk and Master allowed him compensation at the rate of ten per cent. on the amount realized by him. On exception the Chancellor cut this allowance to five per cent. On the record we will modify the decree of the Chancellor, and allow him compensation at the rate of seven and one-half per cent.

In all regards the decree of the Chancellor is affirmed. The cost of this Court and Court below will be paid out of the funds of the association in the hands of the receiver.

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PACKET CO. v. HOBBS.

*(Jackson. June 6, 1900.)***1. EVIDENCE.** *By exhibition and exercise of injured limb.*

In an action for personal injury it is competent for the plaintiff, upon his own motion and in his own behalf, to exhibit and exercise the injured part or limb in the presence of the jury, although two years had elapsed since the infliction of the injury, for the purpose of showing the nature and extent of the injury. (*Post*, pp. 30-40.)

Case cited: *Bruce v. Beall*, 99 Tenn., 303.

2. SAME. *Meaning of oral statements determined by jury.*

It is the province of the jury, not of the Court, to construe and determine the meaning of oral statements given in evidence, and, likewise, when that is material, to determine how such statements were or should have been understood by others. (*Post*, pp. 40, 41.)

Case cited: *McGavock v. Wood*, 1 Sneed, 181.

3. CHARGE OF COURT. *Special requests properly refused, when.*

It is not error for the Court to refuse to give a special instruction, though entirely accurate, when the general charge embraces substantially the same proposition. (*Post*, p. 42.)

Cases cited: *Railroad v. Pugh*, 97 Tenn., 624; *Kaufman v. Fye*, 99 Tenn., 146; *Poole v. Jackson*, 93 Tenn., 63; *Railroad v. Reagan*, 96 Tenn., 129.

4. SAME. *Sufficient as to defendant's negligence and plaintiff's cautiousness.*

It is sufficient in a personal injury case for the Court to instruct the jury that there can be no recovery unless the plaintiff acted cautiously and the defendant negligently, without, in terms, saying that defendant would not be liable for the consequences of a pure accident. (*Post*, pp. 42, 43.)

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5. DAMAGES. *Duty of injured party to lessen.*

It is the legal duty of a person injured by the wrongful act of another to exercise what, under all the circumstances, is reasonable and ordinary care to prevent and diminish his damages. He is not bound to make extraordinary efforts. (*Post*, pp. 43, 44.)

6. SAME. *Same.*

An injured person has discharged his full duty to the wrongdoer, who, to prevent and lessen damages, has selected and used all reasonably accessible means, and has pursued, without medical advice, the course of treatment that would have been prescribed by a physician of ordinary care, prudence, and skill. (*Post*, pp. 44, 45.)

7. VERDICT. *Not excessive.*

The Court would not feel constrained to reverse, as excessive, a verdict of \$4,000, or even of \$6,200, upon the facts stated in the opinion. (*Post*, pp. 46, 47.)

Cases cited: *Boyers v. Pratt*, 1 Hum., 93; *Goodall v. Thurman*, 1 Head, 217; *Railroad v. Roddy*, 85 Tenn., 400; *Cherokee Packet Co. v. Hilson*, 95 Tenn., 7; *Jenkins v. Hankins*, 98 Tenn., 545; *Bank v. Bowdre Bros.*, 92 Tenn., 724; *Brown v. Odill*, 104 Tenn., 250.

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

WARINNER & WARINNER for Packet Co.

McCULLOCH & McCULLOCH, MALONE & MALONE
and JAMES P. BROWN for Hobbs.

CALDWELL, J. The Arkansas River Packet Co.
prosecutes this appeal in error from a judgment

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for \$4,000 obtained against it by B. A. Hobbs, in the Circuit Court of Shelby County, for personal injuries, which it is alleged to have wrongfully and negligently inflicted upon him while disembarking from one of its passenger steamers, at his logging camp on the Mississippi River, about seventy-five miles below Helena, Arkansas.

The first assignment of error complains of the action of the Court in permitting the plaintiff to display and exercise his injured leg before the jury. A stenographic report of what was done and said at this point in the trial is found in the record as a part of the bill of exceptions.

It is in this language: "Mr. McCulloch, plaintiff's attorney: 'If your Honor please, we wish to introduce Mr. Hobbs again, for the purpose of showing the jury his injured limb.'

"Court: 'All right.'

"Mr. McCulloch, question: 'Show your injured knee to the jury. Stand down here on the floor. Can you pull up the leg of your pants?'

"Witness, answer: 'Yes, sir.' (Here the witness rolled up his pants above his right knee, the one alleged to have been injured, showing the naked flesh.)

"Mr. McCulloch, question: 'Is it the same size as the other knee?'

"Witness, answer: 'No, it is longer and it bends in toward the other leg.'

"Mr. McCulloch, question: 'Show how that is,

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Mr. Hobbs. Let the jury see how it affects your movements.' (Witness here moved his leg to and fro.)

"Mr. McCulloch, question: 'Stand up, Mr. Hobbs.' (The witness did so.)

"Mr. McCulloch, question: 'Can't you stand any straighter on your injured leg?'

"Witness, answer: 'No, sir; it is crooked or bent, as you see.'

"Mr. McCulloch, question: 'Now stand on your left leg.' (Witness did so.)

"Mr. McCulloch, question: 'Can't you stand straight on your injured leg?'

"Witness, answer: 'No, sir. I can't bear much weight on it.'

"The defendant's attorney declined to cross-examine on the matters mentioned by the witness, and objected to the whole examination, and each and every question thereof, as incompetent; but the Court overruled the objection, and the defendant then and there excepted and reserved the benefit thereof."

The assignment made in this Court is, that "the trial Court erred in permitting Hobbs, the defendant in error, to strip his right limb naked and exhibit same to the jury during the trial, and manipulate and use the injured knee in their presence for the apparent purpose of showing to them how and to what extent he was affected by the injury, because this was an ex-

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hibit or practical photograph two years after the alleged injury, and because the manipulation thereof could be used to a greater or less extent to exaggerate the hurt and mislead the jury as to its real and practical extent."

It is worthy of remark at this point that, although the objection made below embraces all that the plaintiff said and did upon being recalled to the stand, and the assignment presented here challenges all of his physical acts, the defendant's learned counsel at this bar candidly concedes that it was permissible for the plaintiff to exhibit his injured member and make oral statements about it, and criticizes only that part of the ruling which allowed what he denominates the manipulation and use of the leg in the presence of the jury; the reason for the criticism, as stated, being that the plaintiff was thereby, at the discretion of his counsel and without the requirement of the Court, afforded a practical opportunity to make a misleading exaggeration of the real extent of his injuries.

The ascertainment of truth is the true and ultimate object of every judicial inquiry; and, as a general rule, all evidence is competent which, according to the nature of the fact whose truth is submitted to investigation, may fairly and reasonably facilitate that object.

The particular matter for whose elucidation the

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testimony now in question was introduced was the extent of the plaintiff's injuries. That was the matter under investigation at that stage of the trial, and the jury, whose peculiar province and duty it was to ascertain the same, was, therefore, entitled to the advantage of all available information calculated in its nature to facilitate the ascertainment of the real truth.

How could that investigation have been better promoted, and the attainment of that end better secured than by the course adopted in this instance, with the privilege of all legitimate cross-examination of the adverse party?

In reality the method was a superior one; and, as a result, it produced a higher order of evidence than is usually attainable, in that it added physical illustration and demonstration to oral statement, and impressed the Court and jury through the sense of sight as well as through that of hearing.

It may be true that a designing witness can exaggerate the true condition of an injured limb by false and constrained movements, and yet that cannot render the performance of physical acts inadmissible as evidence any more than the equally obvious fact that he may give undue and false coloring to his oral statements, renders him incompetent to testify by word of mouth. That objection might be urged against all human testimony, but it goes only to the question of weight or

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credibility, and does not reach that of competency or admissibility.

Nor does the fact that the plaintiff exhibited his naked limb, and by its movement further illustrated its defects, of his own volition, upon the request of his counsel and without the requirement of the Court, affect the legal aspect of the evidence. What he did was done in the presence of the Court and by its express permission first obtained; and, besides, if there is any difference in point of admissibility between such acts when voluntarily performed and when unwillingly done by order of Court, the advantage is with the former.

There is great contrariety of judicial opinion in respect of the power of the Court to compel the exhibition of the injured member, and about that we express no opinion, as the question is not now before us; but the authorities are practically unanimous in favor of the proposition that the plaintiff may voluntarily exhibit the member with a view of showing the nature and extent of the injury, and we think the grounds upon which that privilege is so generally justified, with like force justify the voluntary performance of physical acts which are in themselves fit and appropriate as illustrations of the same fact.

The Court held, in *Selleck v. Janesville*, 41 L. R. A., 563, 565, that it was competent for the plaintiff, who sued for personal injuries, "to ex-

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hibit her actual condition to the jury" by being carried into their presence and there giving her testimony while lying upon a lounge and being administered to by her physician.

Answering the defendant's suggestion that plaintiff's appearance upon the lounge with her attending physician was calculated to arouse the sympathy of the jury, the Court said: "If the condition and appearance of such party are genuine, then there is no good reason for concealing them. If, on the contrary, they are feigned, then the jury are quite likely to detect the pretension; and so the influence is liable to operate against the party as well as in his favor, according to the facts." *Ib.*, 565.

So in the present case the plaintiff had the right to impress his genuine condition upon the jury, and if that condition was not in fact as indicated by the exhibition and movements of his limb, his pretense was subject to detection and his cause to consequent prejudice.

In the case of *Graves v. City of Battle Creek* (Mich.), 19 L. R. A., 641, the trial Court refused to require the plaintiff to remove her glove and exhibit her injured arm. That ruling was reversed in the Supreme Court, which said: "The decisions are not uniform upon this question, but the very great weight of authority is in favor of the exercise of such power by the Court under proper conditions, the rule recognizing, however,

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that a wide discretion is vested in the trial Court, which justifies a refusal to require the examination where the necessities of the case are not such as to call for it, or where the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would be merely cumulative, and where, in the judgment of the trial Court, it would not materially aid the jury. . . . The rule is recognized by substantially all the Courts of the country that the injured party may exhibit his wounds to the jury, in order to show their nature or extent, and that rule has been followed in this State. Testimony which is open to one party ought logically to be open to his opponent, if it can be obtained with due regard to decency and in the orderly conduct of the trial." *Ib.*, 642. Many of the adjudged cases on both sides of the disputed question are cited in the opinion.

The Supreme Court of the United States, though recognizing the right of voluntary exhibition, denied the power of the lower Court "to order a plaintiff, in an action for an injury to the person, to submit to a surgical examination in advance of the trial," in *Union Pacific Railway Company v. Botsford*, 141 U. S., 250; and the same ruling was made by the Court of Appeals of New York in *McQuigan v. Del., L. & W. R. Co.*, 14 L. R. A., 466. In those two cases, and especially in a note to the latter one, the con-

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flicting decisions, or many of them, are arrayed and considered.

The action in *Hess v. Lowry* (Ind.), 7 L. R. A., 90, was by a patient against a physician for unskillful treatment of an injured shoulder. The Court said: "It was not error to permit the plaintiff below to exhibit his shoulder to the jury. The jury were, after seeing the condition it was in, better able to apply the evidence of the witnesses." *Ib.*, 92.

The language of the Court in *Carrico v. West Va. C. & P. R. Co.* (W. Va.), 24 L. R. A., 51, was this: "The plaintiff had a right to prove the hurt, and that it had entailed a lasting injury by causing the amputation and loss of his arm. He could prove that by oral evidence. He could himself stand before the jury for ocular demonstration of the fact; and why may he not intensify and make more certain the fact by inspection of the naked shoulder itself? It is only more and more conclusive evidence upon a fact which he was entitled to prove, and, being relevant, we cannot exclude it because there may have been danger of inspiring sympathy in the jury and increasing damages."

In *Patterson on Railway Accident Law*, at page 424, the author says: "A person injured may exhibit his injuries to the jury. Where, in his opinion, the interests of justice justify it, the Court may require the injured person to submit

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to an examination by a competent and disinterested expert, on behalf of the railroad. So, also, the Court may, in its discretion, direct the person injured to perform, in the presence of the jury, a physical act which will necessarily test the nature and character of his physical injuries."

Elliott says: "It is well settled that, in an action for personal injuries, the plaintiff may be permitted, while testifying as a witness in his own behalf, to exhibit the injured part to the jury. It is also held in some jurisdictions that the plaintiff may be compelled to exhibit it or submit to surgical examination before trial, but there are nearly an equal number of authorities to the contrary." 4 Elliott on Railroads, Sec. 1699.

A properly taken X-ray photograph, showing the overlapping bones of the plaintiff's leg, which had been broken through the alleged negligence of the defendant, was, by this Court, held to be admissible as evidence in the late case of *Bruce v. Beall*, 99 Tenn., 303, Judge Beard, who delivered the opinion, saying, among other things in favor of its admissibility, that "the pictorial representation of the condition of the broken leg of the plaintiff gave to the jury a much more intelligent idea of the particular injury than they would have obtained from any verbal description of it by a surgeon, even if he had used for the purpose the simplest terms of his art." *Ib.*, 308.

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In *Alberti v. N. Y., L. E. & W. R. Co.*, 6 L. R. A., 765, the New York Court of Appeals made a like ruling as to the admissibility of an ordinary photograph, which the plaintiff's physician testified was taken in his presence and accurately represented the manner in which the plaintiff's limbs had been contracted by the injury for which he sued.

In his testimony Hobbs narrated the facts attending and causing his injuries, in part, as follows:

"The next morning, after breakfast, I walked out on the front of the boat. We came in sight of the tent, and I told the captain, or rather the clerk, where I wanted to get off at, and he told the captain, and when we got to the landing the boat turned and came in to the landing. The mate and I were talking up on the upper deck, and he told me I had better go down on the lower deck and get on the stage plank to save time. I did as he told me, walking out on the stage. It was in the position it is usually carried, and I held to the guy ropes, supposing they would lower it, and instead of lowering it, why, they picked up the heel of the stage and started tilting it in the other direction, and gave me a start. I turned loose, supposing that they intended to lower the stage, to walk off, and I couldn't stop. I had to go or be thrown off in the river. There was no chance for me to stand

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there after the stage had been picked up, and it was about between four to six feet from the end of the stage to the ground, and when I struck the ground I struck it all in a heap. My knee got a sprain, and was in such a shape I couldn't walk at all; they had to take me and carry me in the tent, and I laid there and suffered for two weeks more than I ever suffered in my life."

The second assignment of error complains of the refusal of the Court to instruct the jury, as matter of law, that the mate's direction to the plaintiff, as stated by him, did not mean that he should go upon the stage plank before it was properly placed in the correct position for a safe landing, and that "the plaintiff was not legally authorized to place such an interpretation" upon what the mate said.

It was undoubtedly the province of the jury, and not of the Court, to determine the meaning of the mate's order (*McGavock v. Wood*, 1 Sneed, 181); hence, the instruction, which so plainly asked the Court to intrude upon the peculiar domain of the jury, was unsound, and, being so, was properly refused.

The third assignment of error is based upon the Court's action in refusing the instruction just referred to, when so modified as to say that the mate's order did not have the meaning mentioned and did not legally authorize the plaintiff to so interpret it, "unless a person of ordinary

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care and prudence would have" given it such interpretation.

The refusal of the modified instruction is justified by the fact that the Court had already covered the same point in the general charge, when he told the jury, in effect, that it was the plaintiff's duty, notwithstanding the mate's order, to exercise ordinary care and prudence in alighting from the boat, and that, if his injuries resulted from his failure to do so, he could have no recovery against the defendant.

It is not error for a trial Judge to refuse to give a special instruction, though entirely accurate, when the general charge, as in this instance, embraces substantially the same proposition. *Railroad v. Pugh*, 97 Tenn., 624; *Kaufman v. Fye*, 99 Tenn., 146; *Poole v. Jackson*, 93 Tenn., 63; *Railroad v. Reagan*, 96 Tenn., 129.

The fourth, fifth and sixth assignments of error raise the objection that "the jury was nowhere distinctly informed that such an accident [as that happening to the plaintiff] might occur without negligence of either party, and that if neither party was guilty of [as much as] ordinary negligence, their verdict should be for the packet company."

It is legally true, as assumed in this objection, that the defendant could not be liable for the consequences of a pure accident to which its negligence did not contribute, and it is also true, as

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a fact, that the Court did not in so many words so instruct the jury; nevertheless, the objection is hypercritical and untenable, since the assignments themselves concede, as they must do in view of the record, that the Court more than once instructed the jury that the plaintiff must be found to have acted cautiously and the defendant negligently in the matter of his disembarkation before a verdict could be returned against the defendant.

The concession answers the criticism. Instruction that the defendant could not be liable unless it had been negligent meant, *ex vi terminorum*, that it must be excused from responsibility for a pure accident, in which its negligence had no part. The limitation of liability to the one condition necessarily excluded all idea of liability on the other condition. *Expressio unius est exclusio alterius*.

The seventh assignment of error calls in question that portion of the charge in which the Court instructed the jury, in substance, (1) that it was the duty of the plaintiff, upon being injured, to do all reasonably within his power to have his knee cured and restored to its original condition, and (2) that, if he selected and used all reasonably accessible means for that purpose, and, for a time upon his own judgment and without medical advice, adopted and pursued such treatment as a physician of ordinary care, prudence and skill would have used in treating an

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injury, the law would accept that action on his part as a full discharge of his duty in that behalf, even though it might appear from the evidence at large that a more skillful treatment might have produced a more favorable result.

To our minds this instruction is entirely sound and unobjectionable. The first proposition announces the generally accepted doctrine that he who is injured in his person or in his property by the wrongful act of another should take reasonable precautions to repair the injury and prevent the enhancement of ultimate damage; and the second proposition rightly applies that doctrine.

It is not ground of just objection that the second proposition allowed the plaintiff credit for full performance of his duty, on condition that he should show the use of all reasonably accessible means for his cure and that he pursued upon his own judgment that course of treatment which would ordinarily have been adopted by a physician; for, if he did for himself what an ordinarily careful, prudent and skillful physician would have done for him, he thereby unquestionably answered the requirement of the law.

The same result must have followed the same treatment, no matter who the adviser may have been.

In no event will the wrongdoer be heard to say that the person injured was bound, at his peril, to secure the services of the most skillful

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physician in the community, or to adopt the treatment which in the end would prove to be the most efficacious.

The exercise of reasonable and ordinary care and prudence according to the circumstances of the case, is all the law demands; and when that is shown the plaintiff's damages, otherwise recoverable, cannot be diminished upon the ground that extraordinary efforts on his part might have made his ultimate injury less. *Selleck v. Jamesville* (Wis.), 41 L. R. A., 563, 565-6; 2 Thompson on Neg., 1258, note b, citing *Indianapolis v. Gaston*, 58 Ind., 227.

That the injured person is bound to exercise only reasonable and ordinary care in the employment of a physician is forcibly illustrated in those cases where the defendant is adjudged responsible for full damages, although the physician so employed may have enhanced the damages by mistaken or unskillful treatment. 2 Thompson on Neg., 1091; *Selleck v. Jamesville*, 41 L. R. A., 565-6.

"That an injured party does not adopt the best remedies or follow implicitly the directions of a physician," says the Supreme Court of Arkansas, "will not excuse a wrongful injury which produces, as its direct effect, a disease from which death ensues." *Railway v. Orr*, 46 Ark., 182.

The Court in *Railway Co. v. Zantzinger*, 44 L. R. A., 553, 556, stated the general rule to

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be that of ordinary care, but ruled that the mere failure to exercise that degree of care would not preclude a plaintiff, upon whom an injury had been willfully inflicted, from recovering all damages sustained, including that part which might have been prevented by the use of such care.

The eighth and last assignment of error complains of the recovery as excessive. The verdict was for \$6,200, but the plaintiff remitted \$2,200, and judgment was entered for \$4,000.

Plaintiff was a comparatively young man with sound body, long expectancy of life and good earning capacity at the time he was injured; but, after great and protracted suffering, he appeared at the trial as one permanently disfigured and crippled, with only about half his former ability to earn a living for himself and family—the change having been wrought, as the jury found, by the negligence of the defendant. Such a recovery for such an injury cannot be truly said to be excessive. The amount, whether that of the verdict or that of the judgment be regarded as the true criterion here, is in neither case so large as to indicate passion, prejudice, partiality, caprice or corruption on the part of the jury, and yet, it must be of that magnitude to justify this Court in granting a new trial for excessiveness. *Boyers v. Pratt*, 1 Hum., 93; *Goodall v. Thurman*, 1 Head, 217; *Railroad v. Roddy*, 85 Tenn.,

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400; *Cherokee Packet Co. v. Hilson*, 95 Tenn., 7; *Jenkins v. Hankins*, 98 Tenn., 545; *Bank v. Bawdre Bros.*, 92 Tenn., 724; *Brown v. Odill*, 104 Tenn., 250.

Let the judgment be affirmed.

Strother v. Reilly.

STROTHER v. REILLY.

(Jackson. June 12, 1900.)

1. TAX SALE. *Void, when.*

A tax sale of lands, which are at the time of sale subject to a deed of trust, made under a chancery proceeding after the owner's death, is void, where his heirs are not made parties, although the trustee or his heirs and the beneficiary in the trust deed are made parties. (*Post*, pp. 51, 52.)

2. SAME. *Rights of purchaser upon setting aside tax sale.*

A purchaser of land at a void tax sale, against whom suit has been instituted by the original owner or his heirs to recover same, may by cross-bill, if the suit is in equity, or by original bill, if the suit is at law, recover and collect by sale of the lands, the amount of the purchase price paid thereon, so far as it was applied to the owner's benefit, and all amounts paid on subsequently accruing taxes, and all sums expended in improvements of the property to be paid out of rents received, to the extent that the value of the land was enhanced thereby, together with interest on all said amounts. (*Post*, pp. 52-58.)

Code construed: § 5009 (S.); § 3991 (M. & V.); § 3261 (T. & S.).

Cases cited and approved: *Caldwell v. Palmer*, 6 Lea, 654; *Elliott v. Cochran*, 2 Sneed, 468; *Martin v. Turner*, 2 Heis., 384; *Arrington v. Grissom*, 1 Cold., 522; *Campbell v. Bryant*, 1 Leg. R., 137; *Jones v. McKenna*, 4 Lea, 630; *Trousdale v. Maxwell*, 6 Lea, 161; *Quinby v. Transportation Co.*, 2 Heis., 596; *Wicks v. Sears*, 4 Lea, 298.

Cited and distinguished: *Ross v. Mabry*, 1 Lea, 226.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
JNO. L. T. SNEED, Chancellor.

Strother v. Reilly.

F. H. HEISKELL for Strother.

MALONE & MALONE for Reilly.

McALISTER, J. This bill in ejectment was preferred by Geo. W. Strother, his wife, Annie, and James Kinnaird against James Reilly *et al.* to recover possession of lot 511 on Hill Street, in Memphis. It was alleged in the bill that James Reilly was in possession of the lot and claimed title thereto by virtue of a decree of the Shelby County Chancery Court in the cause of the *City of Memphis v. Austin M. Bull*, filed November 5, 1874, and an amended bill filed August 30, 1883, consolidating said cause with that of the *State, etc., v. Butler*. The object of those bills was to enforce the payment of delinquent taxes on said lot due the State of Tennessee, the county of Shelby and the city of Memphis. Reilly purchased the property at the tax sale on April 11, 1885, and on February 8, 1886, the sale to him was confirmed at the sum of \$375. Reilly was awarded a writ of possession and continued to pay subsequently accruing taxes down to 1892. The theory of the present bill is that the title of Reilly acquired in those consolidated causes was void for the reason that Austin M. Bull, at the time of the rendition of the decree, was dead, and his heirs were not parties defendant. Reilly filed an answer and cross bill, in which he denied any title or right of possession in complainants,

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and called for proof of same. He averred that if Bull ever had any title, it was merely equitable, and that such equitable title had been since abandoned. That, on the day he was supposed to have obtained the deed, namely, July 14, 1859, he executed a trust deed of the lot in question to Henry Wade, as trustee, to secure to William H. Cheeseman, from whom he bought the property, the payment of the purchase money, \$1,349, evidenced by three notes, due at three months, ten months, and fifteen months from date, and that this trust deed had never been released, nor the purchase money paid, and that neither Bull nor the complainants had ever exercised any acts of ownership over the property, and if they ever had any title, it had been abandoned. He set up laches on the part of the complainants, and claimed that if they had ever been entitled to the lot, their right to the possession had been lost by their laches.

It was further averred that Austin M. Bull and William H. Cheeseman were described as non-resident defendants in said tax proceedings, and Henry Wade, the trustee, having died, Susan Wade, Henry and Belle Wade, heirs at law of said Henry Wade, trustee, were also made defendants. It was insisted that, if Austin M. Bull was dead at the date of the rendition of the decree in the tax cases, that the heirs of Henry Wade, trustee, who held the legal title, were be-

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fore the Court, and that this title passed to and was vested in James Reilly.

In his cross bill Reilly averred and showed by the evidence that he paid out the following sums in good faith upon said lot:

Purchase money and interest thereon..\$	679 50
Taxes paid since purchase, and interest thereon	254 80
November 14, 1889, for sidewalk, and interest thereon.....	111 65
Building house, and improvements.....	300 00
Total	<u>\$1,345 90</u>

Cross complainant prayed that in the event the Court should finally hold and decree that the Bull heirs are the owners of said lot and entitled to the possession of the same, then, as said parties are seeking equity, that they be compelled to do equity, and that he have a decree for said sum of \$1,345 laid out and expended by him, and that the same be declared a lien on the lot, and that the same be sold on a credit of at least six months, so as to bar the equity of redemption.

At a former day of the term we affirmed the decree of the Chancellor adjudging complainants' title superior and that Reilly's title was void for the reason that at the time the decree was pronounced in the tax cases Austin M. Bull was dead and his heirs at law were not made parties

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to said proceedings. It was further held that it was not sufficient that the heirs of Henry Wade, trustee, were made parties, the rule in this State being that the beneficiaries in the trust must be made parties to such a proceeding. Gibson's Suits in Chancery, Sec. 157. Neither the heirs of Bull nor Cheeseman were made parties defendant. We held, however, that Reilly, under the prayer of his cross bill, was entitled to a lien on the lot for the purchase money and taxes paid by him down to and including the year 1892, with interest, and also the value of the improvements erected by him to the extent they enhanced the value of the property, less rents and profits. Shannon's Code, § 5009; *Caldwell v. Palmer*, 6 Lea, 654.

A very earnest petition is now presented, in which the Court is asked to reconsider its decree to the extent that a lien was declared on the property in favor of Reilly for sums paid by him on account of purchase money, taxes, and improvements. It is insisted that the doctrine of *caveat emptor* applies in all cases of tax sales; that if the proceedings are void the purchaser is remediless; that his payment is a voluntary one, and as there is no warranty at a judicial sale, the purchaser assumes all risks.

It has been held by this Court that "where an executor sold slaves under the Act of 1827 to pay debts of the estate, which sale was void for

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failure to make the heirs parties, it was held, on suit to recover the slaves; that if the purchase money was in whole or in part received by the heirs, or appropriated to their use or for their benefit, they should be held bound for the same." *Elliott v. Cochran*, 2 Sneed, 468-71.

"So where land was sold under a void decree during the civil war, and the purchase money was paid in Confederate money, yet inasmuch as Confederate money had been used to pay the debts of the estate, it was held that upon recovery of the land the heirs must refund the value of the Confederate money used to pay debts of the estate, with interest from the time it was used, and the sum total was declared a lien on the land." *Martin v. Turner*, 2 Heis., 384.

"So where a slave was sold under a decree of the Circuit Court, which decree was void because the Court was without jurisdiction to hear the case, for the reason that it had not the equity jurisdiction invoked, and hence had no jurisdiction of the subject-matter, it was held that the complainants should refund the purchase money, with interest in proportion in which it was received by the parties complaining." *Arrington v. Grissom*, 1 Cold., 522-25. See, also, *Campbell v. Bryant*, 1 Leg. R., 137.

"The foregoing decisions have been repeatedly affirmed, the Court saying that 'these decisions rest upon a principle of equity so obvious as to

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commend them to our sense of justice, outside of their binding authority as precedents.'” *Jones v. McKenna*, 4 Lea, 630-41.

“And it is equally well settled that not only the original purchaser of the land, but his vendee, may have the benefit of this equity, by way of subrogation, to the extent of the purchase money paid which came to the use of the minors.” *Trousdale v. Maxwell*, 6 Lea, 161-4; *Caldwell v. Palmer*, 6 Lea, 652-56.

“In the last case cited there is an extended discussion and review of all the cases, and it is said, in reference to this equity, ‘It has been enforced wherever a sale of land is rescinded for any cause, either at the instance of the vendor or vendee,’ and (to quote the syllabus) it was further declared that ‘neither the statute of limitations nor lapse of time will bar the assertion of the right, if asserted in the adjustment of account between the parties, growing out of the recovery of the heirs.’” *Caldwell v. Palmer*, 6 Lea, 652-57.

“And if the land is recovered by an action of ejectment at law, equity will, upon bill filed, afford the same relief as if the heirs had filed their bill asking to be put in possession.” *Caldwell v. Palmer*, 6 Lea, 652-57.

The principles enunciated in the foregoing cases have been applied by this Court in tax cases. In the case of *Quinby & Co. v. North American*

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Coal & Transportation Co., 2 Heis., 596, it appeared that *Quinby & Co.* filed a bill in the nature of a cross bill for the purpose of setting up a title to the land in controversy and claiming to have purchased the same at tax sales, or to be the assignee of others who had purchased. The Court held that on account of certain defects in the proceedings the tax sales were absolutely void and communicated no title, either legal or equitable. "It appears, however," said the Court, "that complainant paid taxes on said land not only for the years 1856 and 1857, but for a number of other years subsequent, and as they have discharged a charge upon the land fixed by law, they are entitled to be reimbursed the sums so paid." Attention is called to the fact that the purchases in that case were not made under a chancery proceeding, but under the old *ex parte* system.

In the case of *Wicks v. Sears*, 4 Lea, 298, it appeared that *Wicks* filed a bill charging that respondent had purchased the land at a sale for Federal taxes assessed during the war, and asking that said sale be declared void. This Court, constrained by decisions of the U. S. Supreme Court, held said sale valid, and dismissed complainant's bill. It appeared that during the litigation *Sears* was in possession of the property, but neglected to pay the taxes, whereupon a receiver was appointed to collect the rents. It further appeared

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that prior to the appointment of a receiver and while Sears was in possession of the property, Wicks paid the current taxes. The Court held that Wicks was entitled to be reimbursed out of any funds in the hands of the receiver. The only case apparently out of line with those cases is that of *Ross v. Mabry*, 1 Lea, 226. But as said by this Court in *Wicks v. Sears*, 4 Lea, that was a case where a complainant sought to have a lien on the land and a sale of it for the repayment of the taxes, interest, and penalties, on the simple allegation that he had bought it at a tax sale, without even showing that his title was defective. Neither the validity nor invalidity of the title acquired was alleged. It was remarked in that case that the purchaser had paid money for the use of the property owner, and ought in good conscience be reimbursed, but that the rule of *caveat emptor* seems to apply to tax sales. We do not think the precise question here was presented in *Ross v. Mabry*, since the bill in that case asked that the purchaser have a lien on land bought at tax sale for the taxes paid, merely because the complainant became the purchaser, and not because his title had failed or was defective. When limited to its precise facts the authority of that case is not questioned, but so far as it is intimated therein that a purchaser whose title has been adjudged void has no remedy for his purchase money and subsequently ac-

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cruing taxes paid by him, that case is not authority. It is in conflict with our own cases and the great weight of authority in the other States.

In the case of *Knox v. Dunn*, 22 Kansas, 883-4, Mr. Justice David J. Brewer, while a Judge of the Supreme Court of Kansas, said, viz.:

"This was an action to quiet title, brought by the owner of certain lots against the holder of a tax sale certificate thereon. It was conceded that the lots were subject to taxation, levy regular, and the valuation not excessive; also that the owner had paid no part of the taxes. Several defects are alleged in the assessment and the sale proceedings. These defects, we shall concede without deciding, were sufficient to invalidate the sale; yet, notwithstanding those defects, we think the plaintiff was not entitled to the judgment in this action, and for the cardinal rule of equity that he who seeks equity must first do equity. . . . Here a party, who admits that he owes an honest debt to the State, comes into a Court of Equity, and, without paying or offering to pay the debt, asks that the proceedings which the State has taken to collect that debt be adjudged void. We have already decided that an injunction will not lie under these circumstances. *City of Lawrence v. Killam*, 11 Kan., 499; *Challis v. Commrs. of Atchison County*, 15 Kan., 49. And we now decide that a lot owner cannot obtain

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any such relief by changing the action to one for quieting title." *Knox v. Dunn*, 22 Kan., 883, 884; 1 Pom. Eq. Jur., Sec. 393, and notes.

"When the owner seeks, in a Court of Equity, to have a tax deed set aside and the cloud created thereby removed from his title, the familiar maxim, 'He who seeks equity must do equity,' will be applied, and he will be required to pay the amount for which the land was sold and all subsequently paid taxes, with interest, as a condition to relief." 25 Am. and Eng. Enc. Law, p. 735, and authorities cited. It is hardly necessary to add that it must appear in all cases that the taxes were due and were a charge upon the land.

In view of the settled law on this subject, we adhere to our former ruling, which declared that cross complainant was entitled to be reimbursed his purchase money and interest and all amounts paid by him on taxes subsequently accruing down to and including the year 1892. So far as the improvements are involved, that matter is regulated by § 5009, Shannon's Code, which provides, viz.:

"Persons holding possession in good faith under color of title are entitled to have the value of their permanent improvements set off against the rents and profits which the plaintiff may recover."

To the extent herein indicated, the decree of the Chancellor is reversed and the cause remanded for an account upon the principles herein stated. The costs of the appeal will be divided.

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MORRISS BROS. v. BOWERS.

*(Jackson. June 13, 1900.)*1. DECLARATION. *States a case of actionable negligence, when.*

A declaration is sufficient which avers that plaintiff, while in a position assigned him by a superior servant, was injured by reason of the unfitness of the appliances used in the service, whose defects were not of a latent character, but were unknown to plaintiff, who relied upon defendant to furnish safe and suitable appliances for the service, although it fails to aver that defendant knew of such defects or could, by the exercise of reasonable care, have discovered them. (*Post*, pp. 60-65.)

Cases cited and distinguished: *Railroad v. Handman*, 13 Lea, 430; *Bruce v. Beall*, 100 Tenn., 579.

2. SAME. *Defects in, cured by verdict. when.*

Defects in a declaration are cured by verdict "if on the trial the issue requires proof of the fact defectively stated or omitted." (*Post*, p. 66.)

Case cited: *Gas Co. v. Williamson*, 9 Heis., 314.

3. SAME. *Amendment of.*

Objection to a declaration is waived where the parties consent that certain language shall be inserted therein, and that the declaration so amended shall stand as a compliance with an order made upon sustaining demurrer to the original declaration. (*Post*, pp. 66, 67.)

4. MASTER AND SERVANT. *Master's duty to furnish safe tools and appliances defined.*

The duty of the master is absolute to use active diligence to prevent improper or unsafe tools or implements being furnished an employee, by which he may be injured. And it is likewise the master's duty to furnish his employees places to work in which they will not be unnecessarily exposed to danger. The master is held responsible for all defects that are discoverable by the application of the usual and ordinary tests,

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but not for latent defects not thus discoverable. (*Post*, pp. 65-69.)

Cases cited: *Guthrie v. Railroad*, 11 Lea, 372; *Whitelaw v. Railroad*, 16 Lea, 391; *Railroad v. Carroll*, 6 Heis., 358; *Railroad v. Jones*, 9 Heis., 39; *Railroad v. Elliott*, 1 Cold., 613; *Iron Co. v. Pace*, 101 Tenn., 484.

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

H. R. BOYD for Morriss Bros.

PETERS & SMITH for Bowers.

McALISTER, J. The plaintiff below, William Bowers, colored, recovered a verdict and judgment against Morriss Brothers for the sum of \$350 for personal injuries. Defendants appealed and have assigned errors.

The facts are that Morriss Brothers were stone masons and stone dealers in the city of Memphis. William Bowers, colored, was a laborer in their employment, and it was a part of his duty to assist in handling stone and loading trucks, which were run into the mill where the stone or marble was sawed into slabs. Gang saw No. 4, where the accident happened, has a partition on either side of the track, and there was a space of about

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two feet between the railway and the board walls. There is proof tending to show that on the day of the accident Edward Morris, who was foreman of the yard and in charge of the men, went into the shop, where plaintiff was engaged in polishing stone, and directed him to go to gang saw No. 4, and help transfer a truck loaded with stone to gang saw No. 1. When Bowers reached the truck the men were in the act of fastening the stones together with iron clamps. The stone with which the truck was loaded consisted of five slabs five inches thick, five feet wide, and seven or eight feet long. The weight of each slab was about one thousand pounds, and four men were engaged in handling them.

It appears that Bowers asked Morris, the foreman, whether he should fasten the slabs together with the iron chain, but the latter replied they had no time to put the chain on, as it was near quitting time, and that he was in a hurry. He also stated the clamps were sufficient and would hold the stone. It is also stated that the clamps used in fastening the stone together were old steel saw blades, about six inches long and three and one-half inches wide, rendered thin by usage and could be bent by the hand, and were used for the reason they would not break if the stone fell. It was claimed by plaintiff that the usual and proper appliance used in the mill for fastening slabs of this size was a log chain, which

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was placed around the entire lot of slabs and secured to the truck, so that the stone could not fall without overthrowing the truck. It is claimed by plaintiff that the foreman directed him to get a crowbar and go to the south side of the truck to assist in pushing out the loaded truck; that afterwards he was told by said foreman to leave that position and go to the north side. One method of moving the loaded trucks along the railway track was to place a crowbar under the wheel, and bear down, and this method was called pinching. The other was to put the crowbar on the lugs and prize up, which was called leading. While plaintiff was standing at the north front wheel of the truck pinching out the loaded truck with a crowbar, the stone suddenly careened and plaintiff was impacted between the stone and an adjacent post, from which position he was extricated by the use of crowbars. The accident resulted in the loss of the plaintiff's right ear, with serious bruises to his skull, chest, and shoulders. Plaintiff was confined to his bed for about two weeks and to the house about a month.

Two grounds of complaint were urged on behalf of plaintiff as a basis of recovery—first, that the foreman ordered the plaintiff to take the position where he was hurt, which was a more perilous one than that which the plaintiff had already assumed behind the wheel; second, that suitable

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clamps were not used for fastening together the blocks of stone.

The first assignment is that the Court erred in overruling defendant's motion in arrest of judgment, for the reason the amended declaration does not state facts sufficient to constitute a cause of action.

The appellants demurred to the original declaration on the ground that it did not allege that the plaintiff (appellee here) did not know of the condition of the clamps, and did not allege that the defendants (appellants here) knew of their unfitness or of their defects. The demurrer was sustained.

An amendment to the declaration was filed alleging that the plaintiff did not know of the unfitness of said clamps, but relied on defendants to furnish safe and suitable appliances for said service.

It is insisted that the amended declaration, in order to meet the infirmity pointed out by demurrer to the original declaration, should have alleged that Morriss Brothers knew of the unfitness of the clamps, or could, by the exercise of reasonable care have discovered the defect. Counsel cite *Railroad Company v. Handman*, 13 Lea, 430, in which the Court said, viz.: "In ordinary cases the jury should be told that to authorize a recovery these two things must concur—knowledge on the part of the master, or its equivalent,

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negligent ignorance, and a want of knowledge on the part of the servant, or its equivalent, excusable ignorance. If the knowledge or ignorance of the master and servant in respect to the character of the machine were equal, so that both are without fault or in equal fault, the servant cannot recover." This language was used by the Court in a case where the accident was caused by the sudden explosion of a boiler of a locomotive engine, probably from some latent defect, equally unknown and undiscoverable by either party. It will be further noticed that no question of pleading was presented in that case, but the question arose on the Judge's charge, or rather the omission in the charge.

The other case cited is *Bruce v. Beall*, 16 Pickle, 579. In that case it appeared that the accident was caused by the fall of an elevator, resulting from the sudden breaking of the two wire cables by which it was suspended. We think the rule announced is only applicable in cases of latent defects in machinery or premises, and such as are not discernible to ordinary observation, or by the application of the usual and approved tests.

The general rule is that it is not necessary that the employer should be advised of the particular defects causing the injury.

It is enough if the defects were of such a character that it was the duty of the employer

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to take notice of them. Wharton on Negligence, 2d Ed., sec. 210.

"In an action against a railroad company for killing a fireman engaged in the line of his duty, where the declaration alleged that the death was occasioned by reason of the original construction of a culvert on the line of its road, whereby the train was thrown from the track, it was held unnecessary to allege knowledge on the part of the defendants of the defective construction of the culvert." *Railroad v. Sweet*, 45 Ill., 197.

"The duty of the master is absolute to use active diligence to prevent improper or unsafe tools or implements being furnished an employee, by which he may be injured." *Guthrie v. Louisville & Nashville R. R.*, 11 Lea, 372; *Whitelaw v. Memphis & Charleston R. R.*, 16 Lea, 391; *Railroad v. Carroll*, 6 Heis., 358; *Railroad v. Jones*, 9 Heis., 39; *N. & C. R. R. v. Elliott*, 1 Cold., 613.

"The master is responsible for any injury resulting from defects in machinery which might have been discovered by the proper care and skill in the application of the ordinary and approved tests, but is not responsible for defects which might have been discovered by the manufacturer of the machinery by the application of the proper test." *N. & D. R. R. Co. v. Jones*, 9 Heis., 27.

We are therefore of opinion it was not necessary for plaintiff to allege that defendant knew that the

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clamps were defective and unsuitable. It is the duty of the master to know, unless the defect is latent and not discoverable by the application of the usual and ordinary tests, and there is no pretense of any such latent defect in the clamps used on the occasion of the accident. The employer is not an insurer or guarantor of the safety of the tools, machinery or premises, but the measure of his responsibility is to see that they are reasonably safe for the use of the employees. The latter assume the risk of all such defects as are known to him or which might have been discovered by the exercise of ordinary care and diligence. But, independent of this, there was no demurrer to the amended declaration, but defendant pleaded, first, the general issue, and, second, that plaintiff was injured through his own carelessness, and not on account of any want of care on the part of defendant. The rule is that "if a pleading contain a defect, either in substance or form, which would have been fatal on demurrer, yet if on the trial the issue requires proof of the fact so defectively stated or omitted, the defect is cured by the verdict." *Gayoso Gas Co. v. Williamson*, 9 Heis., 314.

Another conclusive answer to this assignment of error is that the amended declaration, in its present form, was filed by consent of parties. The stipulation of counsel of record is, viz.: "It is hereby consented to by both parties that the

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plaintiff can insert in his original declaration, filed herein on November 21, 1898, the following words, viz.: 'Plaintiff further avers and alleges that he did not know of the unfitness of said clamps and their ability to perform the service required of them;' and the declaration so amended shall be the amended declaration required to be filed in this cause by demurrer of December 13, 1898." Signed by counsel for each party.

The third assignment is, the Court erred in the following instruction to the jury, to wit:

"The law requires Morriss Bros., in running and operating a stone yard, to furnish their employees with proper and suitable clamps to secure the slabs which had to be moved, and such as are usually used for that purpose, and also to furnish them places to work which would not unnecessarily expose the workmen to danger."

The fourth assignment may be considered in this connection, to wit:

"Where the preponderance of the evidence establishes the fact that the injury complained of resulted solely and alone from the negligence of Morriss Bros., in one of the foregoing particulars, that is, in failing to exercise ordinary care to see that they were furnished reasonably safe and suitable clamps to hold the stone slabs together while they were being moved on the truck or car, or in ordering them to work in a place in moving the car that was not safe for them to work in,

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then Bowers has the right to recover in this case."

We perceive no objection to either of the foregoing instructions as correct propositions of law. But it is said by defendants' counsel that the instructions were erroneous for the reason that it is shown by the evidence that the clamps were provided for the purpose of protecting the slabs from breaking, and not for the protection of employees, hence it is contended there was no evidence in the record warranting such an instruction. If this is true, then it is evident that Morriss Brothers breached the duty which they owed under the law to their employees. In *Guthrie v. Railroad*, 11 Lea, 372, the rule is stated, viz.: "The duty of the master is to use active diligence to prevent improper or unsafe tools or implements being furnished an employee, by which he may be injured. The servant must use reasonable diligence in guarding against such injuries, but he may well rely, to some extent at least, on the faithful performance of duty on the part of the employer," etc.

The rule, we may add, is adopted from motives of humanity to the employee, and the preservation of property, while a proper, is yet a secondary consideration.

Nor was there error in the instruction given in respect of the duty of the employer to keep the premises used in the prosecution of his business

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in reasonably safe condition. *Iron Co. v. Pace*, 17 Pickle, 484. Wood on Master and Servant, Sec. 334.

We have examined the remaining assignments, and find in them no reversible error.

Affirmed.

Hughes v. Abston.

HUGHES v. ABSTON.

(Jackson. June 14, 1900.)

1. MORTGAGES AND DREDS OF TRUST. *Liability for conversion of mortgaged property.*

A commission merchant who sells for another chattels that are incumbered by a valid registered mortgage, is liable to the mortgagee for their value, although he may have paid over their proceeds before suit. (*Post*, pp. 71, 72.)

2. SAME. *Of another State.*

And a valid mortgage of chattels situated in another State, which was made and registered in that State, will, in the absence of some settled rule of public policy forbidding it, be enforced by the Courts of this State when the mortgaged property comes within their jurisdiction, to the same extent as a domestic mortgage. (*Post*, p. 72.)

Case cited: *Bank v. Hill, Fontaine & Co.*, 99 Tenn., 45.

3. SAME. *Description of property in foreign mortgage.*

If the description of property in a foreign mortgage is sufficient under the laws of the State where it was made and registered and where the property is situated, it will be held sufficient in this State, although it might be inadequate in a domestic mortgage. (*Post*, pp. 72, 73.)

4. SAME. *Same. Example.*

For example, a mortgage made in Arkansas, describing the property as "my entire interest in crop of corn, fodder, oats, cotton, cotton seed, to be grown by me this present year 1899," situated in a certain county of said State, is valid under the laws of that State, and will therefore be sustained in this State, though the description is perhaps insufficient under our decisions for a domestic mortgage. (*Post*, pp. 72, 73.)

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Cases cited: McGavock v. Deery, 1 Cold., 265; Thurman v. Jenkins, 2 Bax., 429.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

SHEPHERD & MYERS for Hughes.

PIERSON & EWING for Abston.

WILKES, J. This is an action by complainants, claiming under a chattel mortgage executed and registered in Arkansas, to hold the defendant liable for the proceeds of five bales of cotton upon which the mortgage rested, and which were sold by the defendant, a commission merchant or cotton factor in Memphis.

The bill was demurred to on two grounds—one that it is not alleged that the defendant still has the proceeds of the cotton in his hands, and has not in good faith paid them over to the person for whom he made the sale, and, second, that the mortgage is invalid because the property purported to be conveyed is not sufficiently described in the mortgage.

The Court overruled the demurrer, and the defendant has appealed and assigned as error the action of the Court in overruling the demurrer.

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We are of opinion the first ground of demurrer is not well taken. It is immaterial, if the defendant converted the cotton and received the proceeds, what he did with these proceeds. The important question is, whether it can be treated as a conversion, and this depends upon the effect of the mortgage made in Arkansas upon cotton shipped to Tennessee, after it reaches the State of Tennessee.

The question is, we think, answered by the case of *Bank v. Hill, Fountain & Co.*, 15 Pickle, 45, in which it was said that a sale or chattel mortgage of personal property, good according to the law of another State, will be regarded and enforced by the Courts of a foreign State, where the property is subsequently brought, unless it be contrary to some settled public policy, declared by statute or otherwise, and the rights of such a vendee or mortgagee will be protected against purchasers, as well as attaching and execution creditors, citing quite a number of cases. See, also, the language of the Court on page 46.

The remaining question is whether the description of the chattel mortgage is sufficient.

It is described as "my entire interest in crop of corn, fodder, oats, cotton, cotton seed to be grown by me this present year, 1899," and the property is further referred to as being in Crittenden County, Arkansas.

Unquestionably this is a very vague description,

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and such a mortgage, under our laws, would not, perhaps, hold good, inasmuch as the land is not specified upon which the crops are to be raised. *McGavock v. Deery*, 1 Cold., 265; *Thurman v. Jenkins*, 2 Bax., 429. And this rule is probably in accord with the weight of authority.

It appears, however, that such a description in a mortgage executed in Arkansas is sufficient.

In *Johnson v. Grizzard*, 51 Ark., 410 (same case, 3 L. R. A., 795), it is said: "A mortgage of all my crop of cotton, corn, or other produce that I may raise, or in which I may in any manner have an interest for the year 1884, in Faulkner County, Arkansas, is not void as to third persons for uncertainty. This description could be made certain by extrinsic evidence, and the record of the mortgage gives constructive notice."

In *Henderson v. Gates*, 52 Ark., 371, a description as "all my entire crops of cotton and corn, to be raised by me the present year or contracted by me," was held sufficient. See, also, *Loftin v. Hines*, 10 L. R. A., 491, note; Jones on Chattel Mortgages, Secs. 53, 54, 56.

We are of opinion, therefore, that the decree of the Chancellor overruling the demurrer is correct, and his decree is affirmed, with costs, and the cause is remanded for answer and further proceedings.

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105	74
110	229
110	231

WILSON v. CITIZENS' STREET RY. CO.

(Jackson. June 14, 1900.)

1. VERDICT. *Not set aside on the facts.*

The Court cannot find, upon the facts set out in the opinion, that there is no evidence to support the verdict in favor of the defendant company denying plaintiff damages for injuries sustained by a collision, at a road crossing, of defendant's car with plaintiff's wagon. (*Post*, pp. 75-79.)

2. STREET RAILWAYS. *Duty of motorman at crossings.*

It is the duty of a motorman in charge of an electric car to keep his car well under control on nearing a road or street crossing. He has no right to assume that persons approaching the crossing will take care to avoid a collision, and, finding the crossing clear, to run up to and over it at a rate of speed so immoderate that he could not, if necessary, avoid collisions. (*Post*, pp. 79-81.)

3. SAME. *Duty to look and listen at crossings defined.*

Ordinarily the failure of a person to look and listen when about to cross an electric car line constitutes negligence that will defeat his action for damages for an injury resulting from a collision, but this rule is not absolute and universal. It should be left to the jury to determine, upon consideration of all the facts and circumstances, whether plaintiff was guilty of contributory negligence in failing to look and listen, when it appears that he was not familiar with the crossing and the collision occurred in darkness, and that he was laboring under mistake as to locality of crossing. (*Post*, pp. 81-85.)

Cases cited: Railroad v. Patton, 89 Tenn., 378; Railroad v. Dies, 98 Tenn., 655.

 FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

Wilson v. Citizens' Street Railway Co.

GANTT & PATTERSON and JERRE HORNE for
Wilson.

TURLEY & WRIGHT for Railway Company.

McALISTER, J. This is a suit to recover damages for personal injuries, alleged to have been sustained in consequence of the negligence of the defendant company in the operation of its cars. The case was tried by the Court and jury, resulting in a verdict for the defendant. The plaintiff appealed and has assigned errors. The first assignment is that there was no material evidence to support the verdict, and that upon the undisputed evidence there is liability.

The accident occurred on the night of August 21, 1898, at the intersection of the Macon Road and Grace Avenue, about five miles from the city of Memphis. The street car tracks are on Grace Avenue, running north and south, and crossing the Macon Road at right angles. There is a heavy grade on Grace Avenue, beginning at a point seven hundred and fifty feet north of the Macon Road and descending to the point of intersection with said road. At and near their intersection both roads are in a cut, estimated to be between three and five feet high. There is proof tending to show that any one seated in an ordinary wagon, such as plaintiff was driving, and surrounded as he was, could see a car coming from the north to the south on defendant's track for a distance of

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seven hundred and fifty feet. The railroad track crosses the Macon Road practically at a level, and it is said that the rails are flush with the road. It appears that the plaintiff lived about twenty-five miles from Memphis; that he came to the city on Saturday with a wagon load of chickens, and started home on Sunday night between eight and nine o'clock. The plaintiff was driving a one-horse wagon, going from the west toward the east on the Macon Road, and as he was attempting to cross Grace Avenue, the front wheels of his wagon were struck by an electric car, throwing the plaintiff out, and the wheels of the car passed over one leg, crushing it and rendering amputation necessary. Plaintiff claimed that at the time of the accident he was driving very slowly—that the horse was, in fact, walking; that he had not been over this road exceeding four or five times, and did not know of the exact location of the car line; that the night was dark, and there were no houses or lights to apprise him of the crossing. Plaintiff further testified that his first intimation of the proximity of the track was the loud ringing of the gong on the car; that he immediately turned his head and saw the car approaching at a high rate of speed, and probably not more than twenty-five feet away. It was then too late to escape, and the accident followed. The motorman reversed his car before the collision, but could not stop it before the car and

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the trailer attached to it had cleared the crossing, and the rear end of the trailer stood about forty-five feet from the crossing.

It is agreed by all the witnesses that the car descended the hill very rapidly, some testifying that it was running from eight to ten miles an hour, while others place the speed at ten or twelve miles an hour. The motorman testified that he was coming down grade, with his car under control, and ringing his gong for the crossing; that when he was within fifty feet of the crossing, and seeing no passengers there, he loosened his brake and let the car roll on down; that when within twelve feet of the road he saw a horse approaching the crossing; that he immediately sounded his gong rapidly; that the plaintiff paid no attention to the gong; that he then hallooed at him; that, seeing he made no effort to stop, he reversed the car twice, and made every effort to stop, but struck the horse's head with the dashboard of the car. The motorman further testified that he did not reverse until within about six feet of the point of collision; that he considered he had the right of way, and when he rang his bell people would not get on the track.

The following question was asked the motorman on cross-examination: "And you didn't reverse until you got within six feet of where you say the horse was going to stop on the track?"

Answer: "When I saw he was not going to

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make any effort to stop; I supposed that a man driving along there would see, and naturally give me the right of way—a man with an eight-wheeled car and a trailer, and seventy-five passengers, going down a grade like that.”

Again he was asked, viz.: “Well, you thought he would give you the right of way as you came down the hill, after you rang the bell?” and he answered: “Yes, naturally I supposed he would give the right of way.”

The insistence of plaintiff's counsel is that the proximate cause of the accident was the immoderate rate of speed at which the motorman was approaching the crossing, and his unwarranted assumption that plaintiff would keep out of the way, and that the company had the right of way.

The theory of the defendant is that plaintiff drove on the track, without looking or listening, immediately in front of the car, in such close proximity as to render it impossible for the motorman to stop the car in time to prevent the accident. Plaintiff admits that, while he did not know the exact locality of the railroad track, that he had traveled over the road four or five times prior to the accident, and knew that the track was somewhere in that neighborhood. Plaintiff admits that he did not look either to the east or west when he reached the railroad track, and did not know he had reached the track until he heard the gong ring, which was after he had gotten on

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the track. The uncontradicted proof is that the car was lighted on the inside, and that it carried a good and sufficient headlight.

The motorman testified that he was running down the grade at the rate of about six miles an hour, and that he was on the front of the car, looking for passengers at the crossing.

The motorman further testified that while the embankment would prevent the headlight on the car from illuminating the Macon Road, that it did not prevent a person driving on the Macon Road from seeing the car, since the car was lighted up.

There is also testimony tending to show that the motorman slackened his speed as he approached the crossing, and that at the time of the accident the car was running about six miles an hour. The motorman also testified that the rear end of the trailer passed the crossing only about five feet when the car was stopped, while there is other proof to the effect that the car ran two car lengths, or forty feet.

We cannot say, upon the foregoing statement of the case, there is no evidence to support the verdict, and the first assignment of error is, therefore, overruled.

The next assignment is that the Court erred in delivering the following instruction to the jury, to wit:

"It was the duty of the motorman, Studevart,

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in approaching the street car crossing on the Macon Road, to have his car under reasonable control, and to be on the lookout ahead, and to see whatever an ordinarily careful, prudent motorman would see as to persons, animals, or vehicles, upon the crossing of the Macon Road, or near enough to the track to be struck by the car in passing.

“If no one was in the range of his vision, or if no one was near enough to and approaching the crossing to make the danger of collision probable, he had the right to proceed on his way across the Macon Road, and to assume that if any one was approaching the crossing, they would have their vehicle under proper control and would exercise ordinary care to avoid a collision. And no mistake that Studevant made in regard to these two rightful assumptions, as to how Wilson, or any one else, would act in approaching the railroad crossing, could be charged to him as negligence.”

The Court ignored in this instruction the question of speed at which the car was traveling. The motorman himself testified that when he was within fifty feet of this crossing, seeing the crossing was clear, he loosened his brake, and thereby increased the speed of his car. He further testified that he saw the plaintiff driving towards the crossing at a distance of fifteen feet. It was, therefore, an erroneous instruction to charge the

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jury, upon these uncontradicted facts, that the motorman had a right to proceed on his way across the Macon Road, and to assume that if any one was approaching the crossing he would have his vehicle under proper control, and would exercise ordinary care to avoid a collision. The charge should have been qualified so as to read, "unless the motorman was traveling at an immoderate rate of speed, in view of the proximity of the crossing, and had thereby disabled himself to control the car when the danger of a collision became imminent."

The third assignment is, the Court erred in refusing the following special instruction, viz.:

"If you find from the evidence that the plaintiff did not know he was approaching, and about to cross, a street car track, and by the exercise of reasonable and ordinary care he would not have known it, then it is for you to say whether the plaintiff was keeping such a lookout for vehicles or cars that might endanger his safety, and was otherwise in the exercise of such care as a man of ordinary prudence would have exercised under the same facts and circumstances. If he was, he cannot be charged with negligence."

Again, on this subject the Court was asked to charge, viz.:

"The Court charges you that, no matter how negligent the defendant might have been, if you find from the evidence that the plaintiff was

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guilty of negligence contributing directly to the bringing about of the injury, he cannot recover. In looking to the question whether the plaintiff was guilty of contributory negligence, you are to determine from the evidence what kind of a horse plaintiff was driving; the speed at which he was driving; his familiarity, or lack of familiarity, with the location of the tracks of the defendant; what, if any, lookout he was keeping for the car, or other vehicles that might endanger his safety; the nature and character of the crossing; the time of night or day; the difficulty, if any, of seeing; and every other fact and circumstance bearing upon the case, and to say, upon your fair and impartial judgments, whether he acted as a reasonable and prudent man should have acted. If you find that the plaintiff did act as a reasonable, prudent man, under the facts and circumstances of this case, and you further find that the defendant was negligent in the way in which it ran and operated its car, then your verdict should be for the plaintiff."

These supplemental instructions were asked in view of the fact that the Court had, in its general charge, emphasized the statement that it was the absolute duty of the plaintiff, before going upon the railroad track, to look and listen. The Court charged "that when the evidence establishes the fact that Wilson did not look or listen for a coming car, and if he had done so he could

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have seen the car in time to stop, etc., he cannot recover." Again, the Court said, viz.:

"What would an ordinarily careful, prudent person do, who was driving a horse and wagon along a road at night, approaching and about to cross a railroad track? The law says what he must do. He must look and listen for an approaching car," etc. Again, the Court said, viz.:

"It was the duty of plaintiff, Wilson, on approaching the street car crossing on Macon Road, to look and listen for an approaching car," etc.

The criticism of learned counsel upon this charge is that the duty to look and listen is not an absolute, cast-iron rule of law, which must be applied to all cases, without limitation or exception. The proof shows that plaintiff lived twenty-five miles from the place of the accident; that he had not driven over the road exceeding four or five times; that the night was dark; that there were no houses or lights to warn him of the proximity of the track; that the two roads, at their intersection, were in a cut from three to five feet high; that the railroad track was flush, or level, with the road. The plaintiff had testified that at the time he drove upon the track he was under the impression that the track was located some distance further east, and that in view of his ignorance of his surroundings and the darkness of the night, he was driving very slowly.

We think, under these facts and circumstances,

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the Court was in error in charging that the law imposed on plaintiff an absolute duty to look and listen, and in not leaving it to the jury to say, in view of the proof, whether plaintiff was guilty of contributory negligence in failing to look and listen. The law on this subject is well settled. *Railroad Co. v. Patton*, 5 Pickle, 378; *Railroad Co. v. Dies*, 14 Pickle, 655; *Railroad Co. v. Ives*, 144 U. S., 430; *Railroad Co. v. Farrow*, 66 Fed. Rep., 501; 2 Wood's Railway Law, 328; *McGhee v. White*, 66 Fed. Rep., 504; *Railroad v. Jones*, 95 Fed. Rep., 370; *Continental Co. v. Stead*, 95 U. S., 161.

As said by this Court, in *Railroad Co. v. Dies*, supra, viz.: "The duty of a person about to cross a railroad track to stop, look, and listen is not absolute and universal. This requirement must receive a reasonable construction, and failure to observe it does not always constitute negligence."

Mr. Wood says: "Where a person is ignorant of the location of a crossing, or where the circumstances are such as to mislead him as to the necessity for looking or listening for the approach of the train, he cannot, as a matter of law, be said to be guilty of negligence, *per se*, for neglecting to do so." 2d Wood on Railway Law, p. 1328.

The fifth Pickle case, that of *Patton v. Railroad*, is especially apposite. That was a case where Patton stepped out of the way to allow an ap-

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proaching train to pass. After it had passed, he stepped upon the track, without looking and listening, walking in the direction that the passing train had taken. He did not look back from time to time to see whether a train was coming. He was run down and killed by a detached portion of the train which had passed.

Judge Lurton, who delivered the opinion in the case, said: "The peculiar circumstances under which this intestate went upon the track, and the fact stated to account for his failure to observe this train—that he was crossing a bridge under which there was a waterfall, the noise of which probably prevented him from hearing—alone prevents the negligence of the deceased from barring any recovery whatever."

He further says: "The case stated in the declaration makes an exceptional one, and one which should go to the jury."

He quotes from Wood on Railway Law, wherein he says that there are exceptions to the rule of look and listen.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

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DENNIS v. DENNIS.

(Jackson. June 14, 1900.)

1. DESCENT AND DISTRIBUTION. *Bastards.*

Under the rules of the common law, a bastard had no inheritable blood, but this has been changed by statute in this State. (*Post*, p. 90.)

Code construed: §§ 4163, 4169 (S.); §§ 3268-3270, 3274 (M. & V.); §§ 2420, 2423a (T. & S.).

2. SAME. *Same.*

Testatrix, by her will, gave a residuary legacy to her "heirs and distributees." Three brothers, one sister, and an illegitimate child of a deceased sister survived her, and constituted her only "heirs and distributees." The right of the illegitimate is questioned.

Held: Under the will and the statutes the illegitimate takes through its mother the same interest in the legacy that the mother would have taken if she had survived testatrix. (*Post* pp. 87-96.)

Code construed: §§ 4163, 4169 (S.); §§ 3268-3270, 3274 (M. & V.); §§ 2420, 2423a (T. & S.).

Cases cited and distinguished: *Loughlin v. Johnson*, 102 Tenn., 460; *Shepherd v. Carlin*, 99 Tenn., 67; *Brown v. Kerby*, 9 Hum., 461.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

R. L. BARTELS, JOHN J. GORE and TURLEY &
TURLEY for complainant.

THOS. H. JACKSON for defendants.

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WILKES, J. Mrs. Anna Bingham died in March, 1898, leaving a paper writing which was afterward sustained as her will (except that the thirteenth item was held inoperative), and under it passed a residuary legacy to her heirs and distributees. She left surviving her three brothers and one sister. Complainant also survived her, and claims to be one of her distributees and heirs.

He is an illegitimate son of Patsey Caroline Dennis, a sister of Mrs. Bingham, who died before Mrs. Bingham. The question raised is, whether this illegitimate son of the sister who died before Mrs. Bingham is entitled to take the share the sister would have taken, had she survived Mrs. Bingham. The question was raised by demurrer in the Court below. The Court overruled the demurrer, thus holding the right of the illegitimate to take, and defendants have appealed and assigned errors which present the same question in this Court.

The defendants rely upon the case of *Giles v. Wilhoit*, 48 S. W. Rep., 268, a case decided by the Court of Chancery Appeals and affirmed by this Court, as to the result reached and announced. This case is referred to and commented upon in *Laughlin v. Johnson*, 18 Pickle, 460.

The case of *Shepherd v. Carlin*, 15 Pickle, 67, is also referred to and relied on by defendants, as well as *Brown v. Kerby*, 9 Hum., 461. The contention, in short, is that complainant has no

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inheritable blood, and is not entitled to take from the estate of Mrs. Bingham, along with her legitimate brothers and sisters, his mother having died before Mrs. Bingham.

The case of *Giles v. Wilhoit*, 48 S. W. Rep., 268, involved a construction of § 4166, Shannon's Code, which designates what persons shall inherit the estate of an illegitimate. The exact question which arose was, whether a bastard nephew, born of a bastard sister, could inherit from a bastard uncle equally with a living bastard sister of the bastard uncle, and this Court held that the word "descendants," within the meaning of the above statute, applied to legitimate descendants of the brothers and sisters of the illegitimate. This case, therefore, involved the construction of a statute with which the case at bar has nothing to do.

The case of *Laughlin v. Johnson*, 18 Pickle, 455, involved the construction of the latter part of § 4169 of Shannon's Code, and the sole question there determined was that an illegitimate brother could inherit equally with his legitimate brothers and sisters the property of a deceased legitimate sister, who died without her husband surviving her, or without issue, and who acquired the property through her husband. The case at bar in no way involves that portion of § 4169 of the code which is construed in the case of *Laughlin v. Johnson*, *supra*.

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The case of *Shepherd v. Carlin*, 99 Tenn., 64, involved the construction of our statute which provided that slaves who, prior to the passage of that statute, had lived together as husband and wife, were to be thereafter considered as such, and, further, legitimized children which had been born to them prior to the passage of this Act. The statute is in these words: "All free persons of color who were living together as husband and wife in this State while in a state of slavery, are hereby declared to be man and wife, and their children legitimately entitled to an inheritance in any property heretofore acquired, or that may be hereafter acquired, by such persons, to as full an extent," etc. This Court held that a child who was legitimized under the above statute, and whose parents had died prior to the death of the child's aunt and uncle, from whom it sought to claim an inheritance—the aunt and uncle dying without issue, and intestate—was not entitled to inherit from such aunt and uncle. This Court placed this decision upon the ground that the statute in question admitted of no other construction than that given it, namely, that the children of slaves were legitimized, and could inherit only the property which their parents had "acquired."

As the plain words of the statute precluded a child from inheriting, except as to such property as its parents had "acquired," and, as the parents being dead, of course did not "acquire" this prop-

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erty, either in law or fact, the child could not inherit this property.

Under the common law, a bastard had no inheritable blood.

The first act which changed the common law was that of 1819, Chapter 13, Sec. 1, which is in these words: "When any woman shall die intestate, having a natural born child or children, and no legitimate child or children, such natural born child or children shall take, by the general rules of descent and distribution, the estate, real and personal, of his or their mother, and, should either of said children die intestate, without child, his or her brothers and sisters shall in like manner take his or her estate." Under this Act an illegitimate child could inherit from its mother, provided its mother had no legitimate child or children. This Act remained in force until the Code of 1858 was adopted. By the adoption of this code, the Act not being incorporated therein, it was repealed, and, until the Act of 1866-67, Chap. 36, Sec. 10, was passed, no law in regard to illegitimates inheriting was in force. The Act of 1866-67 is in these words: "Where any woman shall die intestate, having a natural born child or children, whether she also have a legitimate born child, or otherwise, such natural born child or children shall take, by the general rules of descent and distribution, equally with the other children, the estate, real or personal, of his or her

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and their mother; and, should either of such children die intestate, without child, his or her brothers and sisters shall, in like manner, take his or her estate." This act is incorporated into Shannon's Code as § 4169, and this is the Act which this Court is called upon to construe in this case, in connection with the general statutes of descent and distribution. Section 4163, subsection 2 (a), Shannon's Code, is in these words: "If the intestate die without issue, his land shall be inherited by his brothers and sisters of the whole and half blood, born before his death or afterwards, to be divided amongst them equally, and if any such brother and sister die in the intestate's lifetime, leaving issue, such issue shall represent their deceased parent, and be entitled to the same part of the estate of the uncle or aunt as their father or mother would have been entitled to if living."

The Act of 1819 expressly excluded inheritances by illegitimates in the event that the mother had a legitimate child. The Act of 1866-67 not only extended the right of illegitimates to inherit from their mother, even though there were legitimate children living at the time, but it also expressly provided that the illegitimates should inherit "by the general rules of descent and distribution, equally with the legitimate child or children."

Now, it is conceded that had the complainant in this case been legitimate, there would be no

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question as to the right to take his mother's portion of the property involved in this litigation, because the statute of descent and distribution expressly provides that, in the event of the death of the brother or sister of the intestate during the intestate's lifetime, leaving issue alive, such issue shall represent and take such estate as the deceased parent would have taken. Nor will it be denied that had the mother of complainant left a legitimate child, as well as complainant, then that legitimate child would have taken that portion of the estate of the mother's sister which the mother would have taken. If this be true, and the statute of 1866-67 gives to illegitimates the right to inherit from their mother, equally with the other child or children, the estate of the mother, according to the general laws of descent and distribution, does it not necessarily follow that the illegitimate could inherit equally with the legitimate, and in the same manner? The statute, § 4169 of the code, therefore, gives to the illegitimate the same right to inherit from their mother as the legitimate children. The illegitimates are put on the same plane and footing as the legitimates, so far as the purpose of inheriting from the mother is concerned, and for this purpose they are legitimate. They then have all the same kindred as her legitimate children have, and when the latter take by descent and distribution, according to the degrees prescribed by statute, the ille-

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gitimates take "equally" with them. The illegitimates take in the same character and in the same manner, as well as to the same extent, as the legitimates, and, therefore, complainant inherits from his aunt that portion of the estate which his mother would have inherited had she been living.

Taking up the case of *Brown v. Kerby*, 9 Hum., 461, it is to be distinguished from the case at bar, in that it involves, solely, the construction of the Act of 1819, which simply provided to what extent an illegitimate could inherit. The provision in the Act of 1819 expressly precluded the illegitimate from inheriting where there was a natural born legitimate child living at the death of the intestate (mother), and necessarily precluded the idea that the illegitimate was put upon the same plane and footing as the legitimate, while the Act of 1866-67 necessarily makes an illegitimate, so far as inheriting from its mother is concerned, the equal of the legitimate.

The case of *Cherry v. Mitchell*, decided by the Court of Appeals in Kentucky on the 10th day of March, 1900, and reported in the Southwestern Reporter in No. 7 of Vol. 55, of date April 2, 1900, is in point. Cherry, by a will, devised his estate to his daughter, Mary. Mary gave birth to an illegitimate child, and died in a few days thereafter. Two weeks after the death of Mary, her father, the testator, died, and his will was

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duly probated. The date of the will was many years previous to the birth of the illegitimate child of his daughter. The illegitimate sued to recover the estate which Cherry had devised to the illegitimate's mother, and the defense was that the child could not take the estate, as it had no inheritable blood, except as to its mother, and that the mother had died prior to the death of the testator. The statute of Kentucky in regard to the inheritance of illegitimates is in these words: "Bastards shall be capable of inheriting and transmitting inheritances on the part of or to the mother." There is also a statute which provides that if a devisee or legatee die before the testator, leaving issue which survives the testator, such issue shall take the estate devised or bequeathed as the devisee or legatee would have done if he had lived; and the question for determination in that case was whether or not the illegitimate came within the meaning of the last quoted statute. The Court of Appeals there held that the word "issue" included the illegitimate, and that it was entitled to receive the estate which had been devised to its mother, she having died before the testator.

The case of *Grundy v. Hadfield*, 16 R. I., 579, was where a man died leaving no issue, father or mother, but left, as his only heirs, a sister, two brothers, the issue of two deceased brothers, and a niece, who was a child of his illegitimate deceased

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half sister. The child of the intestate's illegitimate deceased half sister sued the brothers and sister of the intestate for a share of the estate. The statute of Rhode Island is in these words: "Bastards shall be capable of inheriting or transmitting inheritances on the part of the mother, as if legally begotten of such mother." There was also a statute of descent and distribution in these words: "Descendants of any person deceased shall inherit the estate which such person would have inherited had such person survived the intestate." The Court held that the illegitimate sister, if living, would have been entitled to her share in the estate of her brother, the same as if she were the legitimate half sister of the intestate on the mother's side, and hence her issue under this statute above quoted was entitled to receive that which the mother would have inherited had she lived.

In *Dickinson's Appeal*, 42 Conn., p. 491, *et seq.*, it was held that the legitimate grandchildren could inherit through the illegitimate mother and legitimate grandmother from an unmarried sister of their grandmother, recognizing the right of illegitimates to inherit from collateral kindred—that is, an illegitimate was held to have the power to inherit through its legitimate mother from the mother's legitimate sister (illegitimate's aunt), which is the case at bar. In Connecticut, the law in regard to inheritance by bastards, as well as the

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general statutes of descent and distribution, are similar to ours. The illegitimate child inherits from its mother the same as if legitimate, and the issue of the brother and sister is entitled to the inheritance which its parents would have received had it survived those from whom the inheritance was derived. To the same effect is, *Bennett v. Toler*, 15 Gratt., 588, 627, *et seq.*

Hence it can be seen that other States and statutes on the question of inheritance by illegitimates, as well as statutes prescribing the general rules of descent and distribution, which are similar to those of our own State, allow an illegitimate nephew to inherit through its mother that estate which its mother would have received from collateral kindred had she survived such kindred.

We think the fallacy in the opposite view is in holding the inheritance as passing from Mrs. Bingham direct to the nephew, while it passes through the mother, Patsey Caroline Dennis, and rests in complainant as her distributee. Inasmuch as the illegitimate, under § 4169, takes by the general rules of descent and distribution, he inherits the share which his mother would have inherited if she had survived her sister.

The decree of the Chancellor is affirmed, with costs, and the cause remanded to be further proceeded in.

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PATTON v. DIXON.

(Jackson. June 19, 1900.)

1. LIMITATIONS, STATUTE OF. *Adverse possession for seven years under decree.*

Adverse possession of land held continuously for seven years under a decree confirming a chancery sale thereof and purporting to vest title in fee in the possessor, operates to extinguish all outstanding interests not protected by disability of the owner, and to invest the possessor with title to the land in fee simple. Such decree constitutes color of title under the first section of the Act of 1819. (*Post*, pp. 98-100.)

Code construed: § 4456 (S.); § 3459 (M. & V.); § 2763 (T. & S.).

Cases cited: *Thurston v. University*, 4 Lea, 519; *Duncan v. Gibbs*, 1 Yer., 256; *Johnson v. Britt*, 9 Heis., 756.

2. SAME. *Concurrent and successive disabilities.*

Concurrent disabilities are available to prevent the running of the statutes of limitation only when they are united in one and the same person. Concurrent disabilities existing in different persons, or successive disabilities, whether of the same or different persons, are never available. (*Post*, pp. 100-103.)

Code construed: § 4450 (S.); § 3453 (M. & V.); § 2759 (T. & S.).

3. SAME. *Same. Example.*

Hence an infant heir may be divested of his title by seven years' adverse possession of his lands, if continued as much as three years after ancestor's death, although both he and his ancestor were under disability when the adverse possession began, and continued under same ever thereafter. The infant heir succeeds to the ancestor's right of action in such case, and as to it his disability is not concurrent, but successive, and, therefore, not available. (*Post*, pp. 100-103.)

Cases cited: *Guion v. Anderson*, 8 Hum., 298; *Weissinger v. Murphy*, 2 Head, 674; *King v. Nutall*, 7 Bax., 227; *Burns v. Headrick*, 85 Tenn., 102; *Alvis v. Oglesby*, 87 Tenn., 172; *Gross v. Disney*, 95 Tenn., 596.

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 4. CHANCERY PLEADING AND PRACTICE. *Amendment of bill at hearing allowable.*

The statutes and practice are very liberal in permitting amendments of pleadings, to reach the merits. Hence it is allowable to permit a complainant to amend his bill at the hearing by changing a material date so as to conform to the evidence. (*Post*, p. 103.)

Code construed: §§ 4587, 6145 (S.); §§ 3578, 5078 (M. & V.); §§ 2867, 4335 (T. & S.).

Case cited: *Hogan v. McFarland*, 6 Bax., 104.

 5. COSTS. *Adjudged against successful appellant, when.*

Costs are adjudged against the complainant and appellant who has been successful in his suit to remove a cloud prosecuted against an infant who has no property. (*Post*, pp. 103, 104.)

 6. GUARDIAN AD LITEM. *Fee of, not taxed against successful adversary.*

The fee of a guardian *ad litem* cannot be taxed as costs or otherwise against the successful opposite party, although the ward may be utterly without funds to pay it. Attorneys are required to serve without compensation in such cases. (*Post*, pp. 104-106.)

Case cited and approved: *House v. Whit's*, 5 Bax., 690.

Cited and disapproved: *Yourie v. Nelson*, 1 Tenn. Ch., 617.

 FROM SHELBY.

Appeal from Chancery Court of Shelby County.
JOHN L. T. SNEED, Ch.

C. W. HEISKELL for Patton.

L. T. M. CANADA for Dixon.

WILKES, J. This is a bill to remove clouds from the title of three and one-half acres of land lying

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on the east side of College Street, in Memphis. A *pro confesso* was taken against all the defendants except Beulah Scott Gracy, and relief granted as to all defendants except her. She is a minor, and represented by guardian *ad litem*, and insists she has an interest in the land in controversy, through descent from her deceased mother, Lou Ella Gracy.

The Chancellor found in her favor, and complainant has appealed from that much of the decree of the Court below. The complainant's title is based upon a sale made by the Chancery Court at Memphis on the 28th day of April, 1883, in the cause of the *State v. A. J. Montgomery et al.* Complainant was a creditor of Montgomery, and the land was sold as his property after his death, which occurred in 1881. One of his children was Nannie Smith, who died before her father, in 1874 or 1875, leaving her daughter, Lou Ella, as her only heir. Lou Ella intermarried with Gracy, and was his wife when this land in controversy was sold and adverse possession taken of it, in 1884. She died in 1887, and her husband survived her only a few months, dying in the same year. Lou Ella Gracy was not made a party to the bill under which the land was sold, and, being one of the heirs and representing an interest in his estate, it is said the title to her share and interest in the land is defective, as no one representing it was

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before the Court. Complainant filed his bill in 1899 to remove this cloud from his title, and claims that it is perfected by the statute of limitation. His contention is that the sale was confirmed to him in 1883, and title was at that time vested in him by decree; that he went into possession in 1884, and has had continuous adverse possession since, with adverse claim; that he paid all the purchase money and fully complied with the terms of sale. The defendant's contention for the minor is that, being under disability no statute ran against her. ,

We are of opinion that a decree confirming a chancery sale and vesting title in the purchaser is color of title under the provisions of the statute, and adverse possession thereunder puts into operation the statute of limitation, and, if continued for seven years, gives title under the first section of the Act of 1819. Shannon, § 4456.

The legal title, right of entry, and actual possession all are united in the purchaser in this case. *Thurston v. The University*, 4 Lea, 519; *Duncan v. Gibbs*, 1 Yer., 256; *Johnson v. Britl*, 9 Heis., 756.

The question of difficulty in this case is, Has the statute run against the minor, Beulah Scott Gracy?

It is insisted that her mother was under the disability of coverture in 1884, when the adverse possession began, and so continued until 1887, when

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she died, and that at the time of her death the daughter, Beulah Scott, was a minor, and hence there had been no person obligated to sue, and hence no running of the statute. It is said that the facts present a case of concurrent, and not of successive, disabilities, and hence falls within the provisions of the statute (Shannon, § 4450), which is as follows:

“No person can avail himself of a disability unless it existed when his right of action accrued, but when two or more disabilities then exist the limitation does not attach until all are removed.”

The argument is that the minor's disability existed when her right of action accrued, at the death of the mother, who was a married woman, and hence the two disabilities existed at the same time, and may, therefore, be called concurrent. But we think this is a misapplication of the statute, and the disabilities that are referred to as concurrent, or cumulative, are the disabilities of one and the same person, and not those of different persons. To illustrate, a minor may be at the same time a married woman, and thus have concurrent disabilities. She, on the other hand, may be under the disability of infancy when the adverse possession began, and may, while her minority continues, be married, and thus the disabilities may be cumulative.

But in this case the minor had no interest in

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the land when the adverse possession began. That interest at that time was wholly vested in the mother, who had no other disability but that of coverture.

The statute then began to run against the mother. She and her husband had a joint right of action. If she had survived him, she would have had a separate right of action after discoverture.

In the former case, seven years would have barred the joint action; in the latter, three years after discoverture would have barred the separate action of the wife, provided seven years had elapsed from the original adverse possession.

The minor could not recover, except in the right of the mother. She had no independent interest or right of action when the adverse possession began. When the mother died her right of action only passed to the daughter, and that was extinguished after the lapse of seven years from the adverse possession. Unquestionably this is correct if the bar of seven years had been complete when the mother died, as her only right of action under that state of facts would have been extinguished, and there would have been none to survive to the daughter.

But, whether the bar was complete when the mother died or not, the statute had commenced to run, and was not arrested by her death. The minor had no separate right of action, but only

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such as might survive to her from her mother. This view of the law is, we think, sustained by the cases of *Guion v. Anderson*, 8 Hum., 298; *Weisinger v. Murphy*, 2 Head, 674; *King v. Nutall*, 7 Bax., 227; *Burns v. Headrick*, 85 Tenn., 102; *Alvis v. Oglesby*, 3 Pickle, 172; *Gross v. Disney*, 11 Pickle, 596.

It is said that the Court erred in allowing an amendment of the pleadings at the hearing of the case on its merits. It appears that under the allegation of the bill, the complainant went into adverse possession of the land in 1889, while the proof shows that his adverse possession began in 1884. The Court allowed an amendment of the bill to show that adverse possession began in 1884, and not in 1889, as alleged in the bill. We are of opinion that there is no error in this. The allegation in the bill was, perhaps, a mere inadvertence or clerical error of counsel, and the actual facts appeared from the proof, and defendant was not taken by surprise, nor did she desire or apply for time to meet the case as presented by the amendment.

The statute and practice are very liberal in permitting amendments so as to reach the merits of each case. Shannon, §§ 4587, 6145; *Hogan v. McFarland*, 6 Bax., 104; Gibson's Suits in Chancery, Sec. 427; 1 Enc. Pleading and Practice, p. 578.

We are of opinion that the defendant has no

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right or title in this land that she can enforce, and that the decree of the Chancellor should, as to her, be reversed, and complainant's title perfected. The costs will be paid by the appellant, it not appearing that the minor has any estate that can be reached for that purpose.

After the opinion in this case was handed down, the guardian *ad litem* and solicitor presented a petition asking that a reasonable fee for his services be taxed in the bill of costs against complainant, along with the other costs of the cause, and that this Court fix the amount. This application is upon the theory that the guardian *ad litem* was appointed by the Court below to defend the interest of the minor, and the proceeding against the minor was necessary and inured to the benefit of the complainant by enabling him to clear up his title to the lots, and there is no fund under control of the Court belonging to the minor out of which the Court can direct the fee to be paid.

The exact question presented in this case was presented before Chancellor Cooper in the case of *Carter v. Montgomery*, reported in 2d Tenn. Ch. Reports, 455, and decided at the October term, 1875. The learned Chancellor held that in a case similar to this, when the proceeding was to perfect title, and the infant who was a necessary party had no fund out of which to pay a fee

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to the guardian *ad litem*, it might be taxed as costs to the party seeking to clear up his title and succeeding therein. The learned Chancellor followed his own ruling in the case of *Yourie v. Nelson*, 1 Tenn. Ch., 617, and cited, also, the cases of *Gott v. Cook*, 7 Paige, 544; *Frozer v. Thompson*, 4 DeG. & J., 663; *Walker v. Hallett*, 1 Ala., 379; *Sutphen v. Fowler*, 9 Paige, 280. The amount taxed by the Chancellor in that case was \$20.

The case of *House v. Whitis*, 5 Baxter, 690, was determined at the December term, 1875, of this Court, and involved the same question, upon facts substantially the same. In that case the application was to have the fee paid out of a fund going to the party adverse to the infant, and upon grounds the same in reason as in the case of *Carter v. Montgomery*, to wit, that the proceeding resulted in benefit to the party; that the infant was a necessary party and had no fund out of which the fee could be paid, but the Court held that the effect of an order to pay a fee would be to require the adversary to pay it, and that could not be permitted under the law. It was held that the Court had a right to command services of counsel for persons unable to pay in civil as well as criminal cases, and when a lawyer takes his license he takes it burdened with these honorary obligations, and must perform the services when called upon, even

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though he receive no compensation. In the absence of statutory provision, this is the ordinary rule. 10 Enc. Pleading and Practice, p. 686.

This is decisive of this application, and, while the minor in this case was a necessary party, and the defense rested alone upon the guardian *ad litem*, and was very ably made and with much care and learning, we see no ground upon which we can tax a fee for him against the complainant, and he can only rely upon the approval of his conscience here and his reward hereafter when the final judgment is passed for his compensation. The petition is denied.

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*(Jackson. June 20, 1900.)*1. WILL. *Testator's intention.*

"The intention of the testator is the pole star in the construction of a will." To ascertain this intention the Court looks to the whole will, the circumstances and environments of the testator, the state and condition of his family, the size and extent of his estate as he believed it to be, etc. (*Post*, p. 122.)

Cases cited: *Jones v. Hunt*, 96 Tenn., 372; *Hottell v. Browder*, 13 Lea, 678; *Thompson v. Gaut*, 14 Lea, 313; *Fraker v. Fraker*, 6 Bax., 350; *Hoover v. Gregory*, 10 Yer., 444; *Dixon v. Cooper*, 88 Tenn., 177; *Fry v. Shipley*, 94 Tenn., 252; *Oldham v. York*, 99 Tenn., 77; *Henderson v. Vaulx*, 10 Yer., 34; *Ganaway v. Tarpley*, 1 Cold., 527; *Bunch v. Hardy*, 3 Lea, 547.

2. SAME. *Trust arises upon precatory words, when.*

In order that precatory words in a will may raise a trust, it is essential that it shall appear (1) that the words are, upon a fair construction, imperative; (2) that the subject of the wish or recommendation be certain; (3) that the objects or persons intended to have the benefit of the wish or recommendation be certain. (*Post*, pp. 119, 120.)

Cases cited: *Anderson v. McCullough*, 3 Head, 614; *Clark v. Hill*, 98 Tenn., 300; *Woods v. Woods*, 99 Tenn., 60; *Frierson v. Presbyterian Church*, 7 Heis., 684; *Thompson v. McKissack*, 3 Hum., 631; *Burks v. Burks*, 7 Bax., 356; *Anderson v. Hammond*, 2 Lea, 281; *Alsup v. Clarke*, 15 Lea, 75; *Hadley v. Hadley*, 100 Tenn., 446; *Cruse v. McKee*, 2 Head, 1.

3. SAME. *Same. Example.*

These precatory words contained in a will, to wit: "I want to give my wife an executrix's power to give out of my estate, before division, as much as \$15,000 of bequests to my kinfolds, say to Melville Williams \$5,000 or \$10,000, in her discretion, and the balance to some one else who may be needy," does not raise a trust without affirmative action on the part of the

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executrix naming beneficiaries and fixing amounts, except as to \$5,000 to Melville Williams, which latter recommendation is held, in view of the testator's environments and relations to Williams, to take effect without any action on the part of the executrix. (*Post*, pp. 117-124.)

4. SAME. *Interest on legacies.*

The general rule is that a legacy bears interest from the expiration of one year after testator's death, even when its enjoyment is postponed to a future date. But under the provision of the will in this case, setting apart a fund and impressing it with a trust in favor of Williams for \$5,000, to be paid before distribution, the legacy bears interest from testator's death. (*Post*, pp. 124, 125.)

Cases cited; *Darden v. Orgain*, 5 Cold., 215; *German v. German*, 7 Cold., 183; *Mills v. Mills*, 3 Head, 708; *Harrison v. Henderson*, 7 Heis., 348.

5. SAME. *Children charged with sums advanced by executrix for their support without interest.*

Where a testator provides for equal distribution of his estate among his two children and widow, making the latter his executrix and allowing her a support out of the estate during the course of administration, and then provides for his two children thus: "I give her [the executrix] five years to wind up my estate, but, in the meantime, she must give to Martin and Hattie each \$250 per month to live on," the children will be charged, on final distribution, with all sums advanced under this clause for their support, but without interest. (*Post*, pp. 125-129.)

6. SAME. *Widow takes absolute estate, when.*

The testator's widow takes an absolute estate, not charged with any trust in any event in favor of the after-born child, under the following provision, to wit: "Should my wife give birth to a child in the next eight months, and the child should live, I will and devise to her (she to provide for the child) my residence, together with all furniture of every kind, carriage horses and carriages, etc., . . . and, after that, one-third of all my other property of every kind. In the event the child should not live, say twelve months, then I give her my residence, etc., if she desires it, but she must take of my property her one-third less the value of the residence, etc.'" (*Post*, pp. 129, 130.)

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7. SAME. *Child is pretermitted, when.*

And the child having been born as anticipated, and not having been disinherited by the will, nor any definite, certain, and enforceable provision made for it, but one dependent on the will and bounty of the widow, is pretermitted, and, under the statute, "succeeds to the same portion of the testator's estate as if he had died intestate." (*Post*, pp. 129-131.)

Code construed: § 3925 (S.); § 3033 (M. & V.); § 2193 (T. & S.).

8. SAME. *Method of ascertaining share of pretermitted child.*

In ascertaining the distributive share to which a pretermitted child is entitled, dower, homestead and year's support will not be excluded from the fund for distribution, where the widow has waived these rights by taking a different provision made by the will. (*Post*, pp. 131-133.)

9. SAME. *Same.*

The amount or value of special or specific devises and legacies must be taken into account in computing the share of a pretermitted child; and, in raising a fund to pay the share of a pretermitted child, each devisee or legatee must contribute in the proportion that the value of his devise or legacy bears to the value of the entire estate for distribution. (*Post*, pp. 132, 133.)

Code construed: § 3926 (S.); § 3034 (M. & V.); § 2194 (T. & S.).

10. SAME. *Time allowed for winding up estate.*

A provision in a will allowing the executor five years to wind up the estate does not fix an arbitrary limit upon the administration, but is to be construed rather as an extension of the statutory period. It does not require the removal of a competent and faithful executor because he has been unable to wind up the estate within the time allowed. (*Post*, pp. 133, 134.)

11. ATTORNEY AT LAW. *Fees of not allowed out of general fund, when.*

An attorney who files a bill for some of the legatees and devisees against the executor and other legatees and devisees, to obtain a necessary construction of the will and distribution and settlement of the estate, will not be allowed fees for his services out of the general estate, but must resort to the shares of his

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own clients, where the defendants likewise had counsel and became liable for their fees. (*Post*, pp. 135, 136.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
JOHN L. T. SNEED, Ch.

GEO. GILLHAM for complainant.

HENRY CRAFT, WRIGHT & WRIGHT, and CARROLL & MCKELIAR, for defendants.

WILKES, J. This is a bill to construe the holographic will of Enoch Ensley, deceased. It was made and published July 7, 1890, and the testator died November 18, 1891. The will was probated in Shelby County November 24, 1891. Mary L. B. Ensley, the widow of the testator, qualified as his executrix, and has been acting as such ever since the probate of the will, and the settlement of the estate is still pending. The testator left one son, Martin, and one daughter, Hattie, children of a former marriage, and one son, Enoch, born within eight months after the will was made and before the father died. The defendant, Mary Beecher Ensley, was born after the death of her father. All the children are alive. Martin Ensley was married to Bettie S. Ensley,

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and Hattie Ensley, after the making of the will, married John Hodgson, and is now his wife. Martin Ensley had two children by his wife Bettie—the complainants, Laura S. and Martin Ensley, Jr.—and Mr. and Mrs. Hodgson have one child, Harriet Ensley Hodgson, and all of said grandchildren are minors.

The will is in the following words and figures:

“I make this my last will and testament. I am of sound mind and body sufficient for the purpose.

“I want my property of all kinds to be divided between my wife, Mary L. Beecher Ensley, my son, Martin Ensley, and my daughter, Hattie Ensley, as follows:

“Should my wife give birth to a child in the next eight months, and the child should live, I will and devise to her (she to provide for the child) my residence, together with all furniture of every kind, carriage horses and carriages, etc., on the corner of Rayburn Avenue and Broadway, and after that one-third of all my other property of every kind.

“In the event the child should not live, say twelve months, then I give her my residence, etc., if she desires it, but she must take of my property her one-third, less the value of the residence, etc. The remainder of my property I give to my son and daughter equally, or, say, one-third of the whole each.

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"I appoint my wife sole executrix to execute this will, and I give her power to sell and make title to any of my real estate, particularly my Mississippi river plantations. I, however, except a tract of land of 111 acres, more or less, adjoining the city of Birmingham. This land I don't want sold, but I want it divided equally in value into three parts to my wife, son, and daughter—my son and daughter's part to go to them during their lives, and then to the heirs of their body, but my wife's part to go to her during her life, and should she have no child by me, then I want my two children or their children to take her part. Should either of my children die without heirs of their body living, I want the other child, or her or his children, my wife's child (if she has any by me) to take equally of this land, or, say, one-third of this land so left.

"I have spoken of all my property to be divided in this will so far without making any outside bequests. I want to give my wife an executrix's power to give out of my estate, before division, as much as \$15,000 of bequests to my kinfolds, say, to Melville Williams \$5,000 or \$10,000, in her discretion, and the balance to some one else who may be needy. I give her full power to spend what money she may desire in improving burial grounds and the erection of suitable monuments, etc.

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"I want no bond required of my executrix. I have all faith that she will do everything that is right by my son and daughter. I give her five years to wind up my estate, but in the meantime she must give to Martin and Hattie each \$250 per month to live on. I don't want bond required of my wife as executrix. Witness my hand and seal.

"J. M. TREZEVANT,

ENOCH ENSLEY."

"NAPOLEON HILL,

"Witnesses."

It appears that Martin Ensley was divorced from his wife, Bettie, and conveyed to W. A. Wheatly, as trustee for her and their children, Laura S. and Martin Ensley, Jr., a third part of his share in the estate. Bettie Ensley has since internarried with Geo. C. Henry, and M. L. Selden has succeeded Wheatly as trustee of the children, upon the latter's resignation. Mrs. Bettie Henry (formerly Ensley) purchased another third interest of Martin Ensley, Sr., in his father's estate, and is thus the owner of two-thirds of the interest of Martin Ensley, Sr., and Mr. and Mrs. Hodgson have purchased, and now own, the other third interest of Martin Ensley, Sr., in the estate.

Hattie Ensley, at the death of her father, was a minor, dependent for her support upon her father, with no means or estate of her own. It

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appears that it required \$3,000 per annum each for the support of both Martin and Hattie in the style and station in which they lived as members of their father's family at the time of his death. For a time the amount specified in the will of \$250 each per month was paid by the executrix for the support of the children, when, the funds becoming exhausted and the estate involved, the payments were not continued.

The proof shows that the defendant, Melville Williams, is a nephew of Enoch Ensley, and that the relations existing between the said Melville Williams and the said Enoch Ensley were most intimate and friendly; that Enoch Ensley loaned Melville Williams money at any and all times, and when he was away from Memphis he corresponded with him in the most affectionate terms.

It is further agreed and stipulated that the executrix, Mary L. B. Ensley, did not, during the five years in which she was given to wind up her husband's estate, exercise the discretion with which she was vested to give Melville Williams, or any of the kinfolks of Enoch Ensley, deceased, any sum of money whatever, and that now the said Mary L. B. Ensley declines to exercise this discretion in favor of giving the said Melville Williams or any of his kinfolks any amount of the money under the will of Enoch Ensley, Sr., and that she likewise declines to exercise her discretion not to give them any sum

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of money, but asks the Court to determine this question for her as a matter of law. The bill prays the Chancellor to construe the will of said Enoch Ensley in the following matters:

1. What share does Enoch Ensley, Jr., the minor son of Mary L. B. Ensley, take in his father's estate?

2. Whether or not Melville Williams is a legatee in the estate of the said Enoch Ensley.

3. Whether or not Mrs. Harriette Ensley Hodgson and Martin Ensley should have the sum of \$250 per month from the date of the death of the testator up to the end of five years given to the executrix in which to wind up the estate, and as to whether or not the sums actually paid and to be paid under this clause of the testator's will should be charged against them on the final settlement, as part of their shares.

4. Whether or not Mary L. B. Ensley, as executrix of the estate of Enoch Ensley, deceased, is by the will vested with power to act as said executrix after the expiration of the five years given to her in which to wind up the estate.

5. What interest in the estate has the minor, Mary Ensley, who was born after her father's death?

The Chancellor construed the will and fixed the rights of the parties, and the case is brought to this Court by several of the parties interested, and it becomes necessary to pass upon the entire

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will and the contentions raised in regard to it. The Chancellor held, among other things, in substance:

That Enoch Ensley, Jr., took no interest in his father's estate, and that the only provision made or intended to be made for his benefit was such as he might derive through the provision made for his mother, or through her.

That Melville Williams was entitled to a specific bequest of \$5,000, with interest from November 19, 1891, a year after the testator's death, and that to the extent of \$5,000 the legacy in no way depended on the discretion of the executrix, but that she had the power to increase it to \$10,000; that no trust was created in favor of said Williams or any other person designated as kinfolks, and that, tested from the standpoint of a trust, the provision must fail for indefiniteness, and that the provision was inoperative, except so far as it resulted as a direct bequest or legacy to Melville Williams of \$5,000.

That the provision in the will directing the payment of \$250 per month to Martin and Hattie Ensley to live on should be so construed as to make the same advances upon their shares before distribution, and that the sums paid under this provision must, in the final distribution of the estate, be charged against these shares respectively.

That Mary L. B. Ensley is, by the will, vested with power to sell all and any real estate

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of the testator and make good title to the same, except the 111 acres of land near Birmingham, Alabama, which was directed to be divided and not sold, and that her functions, powers, and duties did not cease at the end of five years from her qualification, but would continue in her until she should be discharged by the Court.

That Mary Beecher Ensley, being a posthumous child, took the same interest in the estate of her father as if he had died intestate, which was designated as one-fourth of the estate, real and personal, remaining after taking out the dower interest of the widow and her homestead interest, and a child's share, or one-fifth of his personal estate, her share to be made up by the other legatees and devisees under the will, in proportion to their respective legacies and devises.

We proceed to examine the several assignments and questions presented without special regard to the order in which they are presented, and, first, as to the rights of Melville Williams. The provision of the will in regard to him is as follows:

"I have spoken of all my property to be divided in this will so far without making any outside bequests. I want to give my wife an executrix's power to give out of my estate before division as much as \$15,000 of bequests to my kinfolks, say, to Melville Williams \$5,000 or \$10,000, in her discretion, and the balance to some one else who may be needy."

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The Chancellor held that the only rights that Melville Williams had were by way of a specific bequest, and that this claim under the will, tested from the standpoint of a trust, fails altogether, and that, therefore, the language of this clause of the will, further than it operates as a direct bequest or legacy to Melville Williams for \$5,000, must fail and become inoperative.

The argument for Mr. Williams is that the sum of \$10,000 was set apart by the testator out of his estate and impressed with a trust in his favor, and that \$5,000 was absolutely devoted to his use and benefit, and the discretion of the executrix extended only to the additional \$5,000. In this connection it is conceded the balance of the \$15,000 over the \$10,000 not given to Mr. Williams must fail because of indefiniteness, but it is insisted that Mrs. Ensley having failed to exercise her discretion by giving the \$10,000 to Mr. Williams, a Court of Chancery would do so upon application.

It is argued, on the other hand, that under the item of the will now under consideration no specific bequest was made to Melville Williams of \$5,000 or any other amount, nor was there a trust impressed upon \$10,000, or any other amount, in his favor capable of enforcement. The language, it is admitted, implies that the testator desired that something should be done for his relatives, but it is said that it also implies that he in-

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tended to leave it entirely to his executrix to give or not to give, as in her discretion she might see proper. It is noted that Melville Williams is not designated with specific certainty as the party to receive anything, but the language used is, "\$15,000 of bequests to my kinfolds, say to Melville Williams \$5,000 or \$10,000, in the discretion of the executrix, and the balance to some one else who may be needy." It is added by counsel that it is difficult to surmise why, if the testator desired to give Mr. Williams \$5,000 absolutely, he did not do so by express direction and positive, definite language, and the contention is that the natural meaning of the language used is that the whole matter of the gift was left to the discretion of his wife, in whom he appeared to have unbounded confidence and trust.

It is said by Pomeroy, in his second volume of Equity Jurisprudence, Sec. 1016:

"In order that a trust may arise from the use of precatory words, the Court must be satisfied from the words themselves, taken in connection with all the other terms of the disposition, that the testator's intention to create an express trust was as fully complete, settled and sure as though he had given the property to hold upon a trust declared in express terms in the ordinary manner. The intention of the testator is the main thing, but how is that to be determined? In the first place, the entire will should be considered in de-

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termining the intention, and the precatory words should not only be of such a character as to indicate that the testator intended a trust to be created, but they must also be consistent with the other provisions of the will. Secondly, the words should be given their natural and ordinary meaning, unless there is something to show that they were intended to be taken in a different sense. In the third place, discretionary expressions which leave the application of the property devised or bequeathed to the caprice or unlimited discretion of the beneficiary will not ordinarily be sufficient to create a trust; and, finally, it may be said that, while uncertainty in the subject or object of the devise is an object to be considered adversely to the trust, such uncertainty will not necessarily be conclusive proof that no trust was intended to be created, and if there is sufficient to enable the Courts to determine and carry out the intention of the testator, they will do so."

It has been well said in our own State that a trust is created, first, if the words are so used as to be imperative, upon a proper construction; second, if the subject of the recommendation or wish is certain; third, if the objects or persons intended to have the benefit of the recommendation or wish be also certain. *Anderson v. McCullough*. 3 Head, 614; 27 Am. & Eng. Enc. Law, p. 38.

The recent cases of *Clark v. Hill*, 14 Pickle,

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300, and *Woods v. Woods*, 15. Pickle, 60, 63, are cited as being in point and controlling, and many other cases are cited, among them being: *Frierson v. Presby. Church*, 7 Hies., 684; *Thompson v. McKissack*, 3 Hum., 631; *Burks v. Burks*, 7 Bax., 356; *Anderson v. Hammond*, 2 Lea, 281; *Belle v. Hardy*, 1 Vesey, 269; *Randall v. Randall*, 135 Ill., 398 (S. C., 25 Am. St. Repts., 373); *Howard v. Caruse*, 109 U. S., 725; *Harrison v. Harrison*, 44 Am. Dec., 364, 377; *Knox v. Knox*, 48 Am. Rept., 487, 494; *Lenne v. Darden*, 5 Florida, 74; *Laurence v. Cook*, 104 N. Y., 638; *Williams v. Mithington*, 49 Md., 572 (S. C., 33 Am. Repts., 286); *Harper v. Phelps*, 21 Conn., 257; *Foose v. Whitmore*, 82 N. Y., 405 (S. C., 37 Am. St. Repts., 572); *Oliffe v. Wills*, 130 Mass., 221; *McIntyre v. McIntyre*, 123 Pa. St., 329 (S. C., 10 Am. St. Repts., 529); *Nichols v. Allen*, 130 Mass., 211; *Ellis v. Ellis*, 15 Ala., 296; *Polk v. Polk*, 10 Simmons, 5; *Ex parte Payne*, 2 Young & Coll., 646; *Perry on Trusts*, Secs. 1161, 113, 115; *Pomeroy's Equity Jurisprudence*, Sec. 1015, and authorities there cited.

The difficulty in the case is not so much in declaring the principles of law involved or in laying down a general rule, as it is in applying the rule as recognized to the facts of the particular case, inasmuch as each case must turn largely upon the phraseology used, whether it is used

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technically, or by a skilled draftsman, or by an inexperienced one not employing apt language. After all, the intention of the testator must be the controlling feature, and one cannot read this provision of the will in the light of the testator's environments without concluding that he intended his nephew to have \$5,000 out of his estate before division, and this executrix, if she saw proper, might increase it to \$10,000. It has been wisely said: "The intention of the testator is the pole star in the construction of a will." *Jones v. Hunt*, 12 Pickle, 372; *Hottell v. Browder*, 13 Lea, 678; *Smith v. Bell*, 6 Peters, 75; *Colton v. Colton*, 127 U. S., 309; *Thompson v. Gaut*, 14 Lea, 313; *Fraker v. Fraker*, 6 Baxter, 350; 3 Milliken's-Meigs' Dig., Sec. 2740, subsecs. 1, 2; 4 Kent, *535, and *557; 2 Story's Eq. (10th Ed.), Sec. 1074f; Pritchard, Sec. 384.

In the agreed statement of facts filed it is admitted this will was written wholly by Col. Ensley; that at the time he made it he considered himself a very wealthy man, perhaps worth more than a million of dollars; that Mr. Williams was his nephew, of whom, as well as of his family, he was very fond; that he was on the most intimate relations with the said Melville Williams; that they corresponded habitually; that the testator took the deepest interest in the material affairs of Mr. Williams; that he loaned him money, or gave him money, and that, out-

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side of his immediate family, there was no one that the testator held in more esteem or was nearer or dearer to him; that he looked after the education of Mr. Williams' children, one of whom was named for him; that he visited him in his home, near Nashville, it being the old family homestead of the Ensleys; that he had a room kept for him there; that he often expressed a purpose of providing for Mr. Williams in his will.

The language used in this legacy is quite informal, and it must be read, keeping in view that it is not that of a lawyer or skilled draughtsman. It clearly implies that the testator intended to set apart out of his estate, before division, a sum of \$15,000 to go as bequests to his kinfolks. This sum is not given to his executrix or any one else, but is set apart out of his estate. That a discretion was placed in his executrix to some extent cannot be doubted; whether it extended to the whole bequest to Melville Williams or to only \$5,000 of it is a question of more difficulty. But looking at the bequest from the standpoint of the testator and construing his inartificial language as best we may, we are of opinion that a trust was impressed in favor of Mr. Williams to the extent of \$5,000 of this bequest, and that a discretion was vested in the executrix to increase it in his favor to \$10,000 if she saw proper. The provision for the balance of the \$15,-

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000 to go "to some one else who may be needy" is too indefinite for enforcement. *Anderson v. McCullough*, 3 Head, 617; *Colton v. Colton*, 127 U. S., 309.

The executrix having failed to execute this trust so far as it is obligatory and pay over this bequest of \$5,000, a Court of Chancery will require it to be done. *Anderson v. McCullough*, 3 Head, 614; *Colton v. Colton*, 127 U. S., 309; *Alsup v. Clarke*, 15 Lea, 75; *Hadley v. Hadley*, 16 Pick., 446; *Cruse v. McKee*, 2 Head, 1; 1 Jarman on Wills, p. 680 *et seq.*; 27 Am. & Eng. Enc. Law (1st Ed.), 40, 41.

As to interest on it, the general rule is that legacies bear interest from the expiration of one year after the testator's death. *Darden v. Orgain*, 5 Cold., 215; *German v. German*, 7 Cold., 183; *Mills v. Mills*, 3 Head, 706. And this is true when the enjoyment of the legacy is postponed by the testator to a future period. *Mills v. Mills*, 3 Head, 705; *Harrison v. Henderson*, 7 Heis., 348. The case of *Harrison v. Henderson*, 7 Heis., 348, is in point. In that case the wording of the will was: "I do set apart out of my estate, in the hands of my executrix, the sum of \$4,000, to be held by my executrix subject to the following trusts," etc. Judge Freeman, speaking for the Court on this point, said:

"This made Henderson testamentary trustee for this fund as soon as it could be raised, if not

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on hand at the death of the old man. If it was on hand, then he would have immediately become the trustee, to hold the fund and its accumulations until the time when it could be paid over to the complainant at the death of her husband. We think it clear that this legacy bears interest from the death of the testator, as his intention certainly was that it should accumulate. The setting apart by his will shows the intention to be that it should take this direction from the date when the will took effect, and not be payable at the end of the year, as is the general rule in cases of pecuniary legacies."

We are of opinion, therefore, that under the rule in the last stated case *Melville Williams* is entitled to be paid this legacy of \$5,000 and interest out of the estate from the testator's death, before a distribution or division is made, but subject to its contribution to the shares of the pretermitted children, as hereafter declared.

As to the provision in the will relating to the bequest of \$250 each per month to Martin and Hattie Ensley, it must be considered wholly from the standpoint of arriving at the real intention of the testator. To do this we must look to the whole will, the circumstances of the testator, the state and condition of his family, the size and extent of his estate as he believed it to be, and read the provision in the light of all these facts and environments. *Hoover v. Gregory*, 10

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Yer., 444, 451; *Dickson v. Cooper*, 4 Pickle, 177; *Fry v. Shipley*, 10 Pickle, 252; *Oldham v. York*, 15 Pickle, 77; *Henderson v. Vaul*, 10 Yer., 34; *Gannaway v. Tarpley*, 1 Cold., 572; *Bunch v. Hardy*, 3 Lea, 547.

We think it was the evident original intention of the testator to divide his property into three equal shares and to give one to his son, one to his daughter, and one to his wife. But, in view of the probability of the birth of a child, and for the purposes of a home, the residence, furniture, carriages, horses, etc., were added to the share designed for the wife. He makes his wife his executrix, and his estate being large and consisting of mining interests slow of realization, he deems it proper to provide that she is to have five years in which to wind it up, instead of the two years and six months prescribed by law; but he was mindful that in the meantime there should be a fund out of which his children could receive their support and defray their current expenses. The provision under consideration was evidently made to meet this condition, and it was, it appears, upon the scale they had been accustomed to spend money for their support while the father was alive. He says nothing about charging the payments against their shares. We think the most natural construction of the language employed, under the circumstances, is that these expenses were to be paid out of the estate

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and as a charge upon it until such time as the estate could be divided and the children receive their portions in severalty. He recognized the fact that the children must be supported and maintained during that time and that his wife and executrix would have no power or authority to advance such support unless it was conferred by his will, and but for this or some similar provision, these children would for five years have been without means of support.

The provision is not an advancement in the sense of being a gift during the life of the parent in anticipation of what the children would receive on the death of their father, for it was not to be paid to them until after his death, and then only for their maintenance and support. It is a general rule recognized in many cases that money provided for education is not to be treated as an advancement, and, *a fortiori*, money provided for support and maintenance is not to be so treated. 2 Williams on Executors, 7 Am. Ed., 895-6, star p. 1291; Pritchard on Wills, Sec. 771; *White v. Moore*, 23 S. C., 456; *Estate of Riddle*, 19 Penn. St., 431; *Connor v. May*, 3 Strob. Eq. (S. C.), 185; *Boles v. Winchester*, 13 Bush, 1; *Fennall v. Henry*, 70 Ala., 484 (S. C., 50 Am. Rep., 85); *Bradshaw v. Canada*, 76 N. C., 445. Such expenses as education and maintenance are incurred in the discharge of parental duty during the life of the parent.

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Bruce v. Griscom, 70 N. Y., 612; *Cooney v. May*, 3 Strob. Eq. (S. C.), 185, 190; *Sanford v. Sanford*, 69 Barb., 293; *Miller's Appeal*, 40 Penn. St., 51 (S. C., 80 Am. Dec., 55). But while these cases are somewhat analogous to the one at bar, they are not conclusive.

The sums directed to be paid in this case are not in any sense advancements, but they are simply the current expenses of his children after his death and pending the winding up of his estate, and until such time as they might receive their separate shares upon a division of the estate, which the testator assumed would take five years. So the question still remains, Shall these amounts directed to be paid to Martin and Hattie be charged up against their shares upon the final distribution, although in the first instance they are to be paid out of the general estate? We think that the conclusion of the Chancellor as to this feature of the case is correct. It was evidently the expectation of the testator that his wife, having his estate in her hands, would take out of it, from time to time, enough for her maintenance and support during the time she was engaged in winding up the estate. Otherwise there is no provision for her support and maintenance during that time. But the children, having none of his estate, or of their shares, in their hands until the final distribution, he provided they should be paid \$250 per month by the executrix

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for their maintenance during that time, and thus that equality was preserved which the testator desired, and in order to maintain and continue that equality it is necessary to charge the amounts received by each on his or her shares respectively upon the final division and distribution, but without interest.

We are of opinion that Enoch Ensley, Jr., must be regarded as having been pretermitted by the will, as well as his posthumous sister, Mary Beecher. The only reference made to him is that in the event of his birth his mother should provide for him; but the only means given her out of which to make such provision is the residence, furniture, carriages, and horses, and even these are not given for that express purpose. While the value of these is not definitely shown, it is evident they are not the equivalent of a share in the estate, and we think it apparent that the testator intended thereby to provide a home for his children of the first and of the second marriage, as well as his wife. The child is only mentioned as it were incidentally, as a probability, in the will, and the only provision for him is in the parenthetical clause "(she to provide for the child)."

Now, under the language used, we are of opinion the wife took her share, including the residence, furniture, carriages, and horses, as her own, and she could dispose of them as she saw fit,

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and there was no obligation on her to provide for the child, except so far as her own love or sense of duty might prompt, and that not out of the estate, but out of her share in it, and the shares of the other children would not be affected thereby. This is not a definite, fixed, enforceable provision for the child, and he must, therefore, be treated as pretermitted in the will. *Burns v. Allen*, 9 Pickle, 149. There is no specific, definite obligation fastened on the mother, and no trust imposed on the estate in favor of the child, and, at most, the provision is a mere statement that the mother will provide for the child. The testator does not directly or inferentially disinherit him, but indicates solicitude for him. He does not use any such expressions as, under the statute, would disinherit the child, and he must take, therefore, as in cases of intestacy. The statute (Shannon, § 3925), provides: "A child born after the making of a will, either before or after the death of a testator, not provided for nor disinherited, but only pretermitted in such will, and not provided for by settlement made by the testator in his lifetime, shall succeed to the same portion of the testator's estate as if he had died intestate."

The statute contemplates an enforceable, definite, and certain provision, and not one dependent on the will or bounty of another.

There is no serious question made but that

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Mary, the posthumous child, must be treated as pretermitted and entitled to take, under the statute, as if the father had died intestate, and, in our view, Enoch must be placed on the same footing.

A very difficult question is the basis upon which these children's shares shall be estimated. The statute says they shall take the same share as if the father had died intestate. The literal application of this provision would require that the widow's dower, homestead, and year's support should first be excluded from computation of the aggregate estate, and an equal share in the remainder be given to the pretermitted children. But the widow has not taken dower and homestead, or other interest under the law, but, on the contrary, has taken under the provisions of the will. If the dower, homestead, and year's support are excluded from the estimate, it is said it can be only on the theory that they go to the widow. But it is evident a widow cannot be compelled to take dower and homestead, or either of them, but may elect to take under the will, as she has done in this case; not only so, but she may renounce and disclaim all right to dower, homestead, or other interest that the law gives her as widow in the estate, which are to be paid primarily out of the estate, and leave the whole of it for division, and, in the opinion of the majority of the Court, this is what has been

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done in this case, and the two pretermitted children are entitled to take as if there had been no will and the widow had renounced her right to dower, homestead, and year's support in the estate—that is, each takes one-fifth of the entire net estate. As to how these shares shall be made up presents also a question of practical difficulty under the facts in this case. The statute provides (Shannon, § 3926): "Toward raising the portion of such child, the devisees and legatees and other heirs shall contribute out of the part devised, or bequeathed to, or settled on them by the testator, in the proportion borne by their respective devises, legacies, or settlements, to the whole estate of the testator."

The Court is of opinion that, in order to determine the shares of the pretermitted children, the net estate, after payment of debts and expenses, must be treated as a whole, embracing in this whole the residence, furniture, carriages, and horses given to the widow and the special legacy to Williams, and the pretermitted children will be entitled to take, with the widow and other children, one-fifth of this aggregate sum as his or her share.

But the widow and two older children and Williams must raise their shares out of their legacies and devises in the proportion which their portions bear to the whole estate, so that the charge upon the widow's share will be increased

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proportionately by the value of the residence, furniture, carriages, and horses, and to the extent that her share is thus burdened by an increase of charge, the effect will be that the shares of the older children and Williams will be proportionately relieved, and it will result that the shares of the pretermitted children will be greater than those of the other two, because the latter can have no interest in the residence, carriages, horses, etc., and the Williams legacy, while all of these are to be computed and taken into estimate in fixing the shares of the pretermitted children, under the law.

We can see no reason for removing the executrix from her office after the expiration of the five years' limit allowed by the will to wind up the estate. The record shows that she has been very energetic in discharging her duties, and the estate is not yet wound up. The testator was largely engaged in mining operations when he died, and his estate consisted of such assets as could not be realized on without delay and taking advantage of market conditions. Indeed, the estate may be said to have had a speculative and uncertain value, depending largely upon the iron market, which became so depressed as at one time to justify proceedings to wind up the estate as insolvent.

To have a change of administration now would but entail confusion and loss. No reason is given

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for her removal. No desire is expressed for it, so far as we can see. The provision of the will does not fix an arbitrary limit beyond which the administration could not extend if necessary, but the five years provided for by the will was intended as an enlargement of the time allowed by law, the testator recognizing that the condition of his estate would at least demand that extension. This provision must, under all the facts, be treated merely as an expression of opinion on the part of the testator that the estate could not be wound up until that lapse of time, when distribution and division might be made, but that object not having been accomplished within the time, it is necessary and proper for the executrix to continue in the exercise of her duties for a longer period. But it is not meant by this to hold that she may delay the distribution of the estate any longer than is necessary for its proper administration, but such distribution should be made at such times and so often as may be practicable and expedient, and as rapidly as the condition of the estate may warrant and justify, leaving only such matters for future administration as may require time for proper disposition and handling.

As to the matter of counsel fees for complainants' attorneys: The bill is one to construe the will of Enoch Ensley and determine the rights of all persons interested therein *inter sese*. The

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rights of all parties are involved, and the entire will must necessarily be construed. It is said the complainants who have filed this bill are only a portion of the parties interested. The widow and executrix, who represents the entire estate, does not bring the bill, but is a defendant to it.

The complainants claim the largest interest in the estate, and larger than the Court believes them to be entitled to. It is said that another bill has heretofore been filed to construe the will, and that counsel fees have already been allowed and paid in that. The suit referred to was one filed by a creditor on behalf of himself and all other creditors, and was for the purpose of administering the estate as insolvent, and at a time when it was with good grounds believed to be so. It appears that, while there was a broad prayer that the Court would construe the will in all respects, it was never in that case construed as to any of the matters involved in the present cause.

The condition of the estate has materially changed. The lapse of time and vicissitudes of fortune have completely changed the status of the estate. It is no longer an insolvent estate in which the rights of creditors are involved, but it is a solvent estate, with a surplus for distribution of perhaps a quarter of a million dollars. The suit was a necessity for all parties. It could and should have been brought by the executrix,

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and in that event her counsel fees would have been allowed her, no doubt. But, inasmuch as the parties other than complainants have also to employ counsel to represent their interests, and they incur fees, it would not be equitable or proper to pay counsel fees representing one interest, and not to pay others as vitally, if not so extensively, interested.

The opinion of the Chancellor will be reversed and modified as herein indicated, and in all other respects affirmed, except that the entire costs of the cause will be paid out of the estate, and the cause is remanded for further action.

SPECIAL DISSENT.

WILKES, J. With all due deference to the opinion of the majority, I do not concur with them upon the basis for estimating the shares of the pretermitted children. I think the statute lays down a plain, imperative rule to be applied in all cases, and that is that the pretermitted child takes the interest he or she would have taken if the deceased had died intestate, and the rule and basis is the same whether the widow takes her dower and homestead and year's support and distributive share, or does not take them. The basis is fixed by the statute without regard to what the widow may elect to do, and it is only under the statute and according to its terms that the pretermitted child

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can take anything. I am of opinion, therefore, that the true rule is that, in estimating the shares of such pretermitted child, the value of the dower, homestead, and year's support should be excluded, and not treated as a part of the aggregate fund in which the child may share. If the pretermitted children receive any benefit from the relinquishment of dower, homestead, and year's support, it is not under the statute, nor by virtue of its provisions, nor out of the testator's estate, but from the widow's relinquishment and bounty, and out of her share and interest in the testator's estate under the law. The value of the widow's share as legatee does not stand on the same footing as her dower, homestead, and year's support, as she takes that on a division with the children, and not as a primary charge out of the estate before division.

Mercantile Co. v. Bowers.

MERCANTILE Co. v. BOWERS.

(*Jackson*. June 25, 1900.)

1. MARRIED WOMEN. *Liability for debts contracted in mercantile business.*

Coverture is a good defense to notes executed by a married woman in conducting a mercantile business prior to the passage of the Act of 1897, declaring married women engaged in mercantile and manufacturing business liable for their debts incurred in such business, although she may have recognized the existence of said notes after the passage of that Act.

Act construed: Acts 1897, Ch. 82.

2. SAME. *Estate of, not subject to her debts, when.*

Where her coverture defeats judgment upon her debt, a married woman's property, other than her separate or other estate which she has bound by express valid contract, cannot be reached and subjected to her creditor's claim.

Cases cited: *Federlicht v. Glass*, 13 Lea, 481; *Theus v. Dugger*, 93 Tenn., 41.

FROM TIPTON.

Appeal from Chancery Court of Tipton County.
JOHN S. COOPER, Ch.

Mercantile Co. v. Bowers.

W. A. OWEN and SIMONTON & SON for Mercantile Co.

SMITHEAL & BAPTIST for Bowers.

WILKES, J. This is a bill to set aside a conveyance charged to have been fraudulently made. The Chancellor refused relief, and the complainant has appealed and assigned errors.

The defendant, F. E. Bowers, wife of J. E. Bowers, was engaged in a mercantile business in Covington, and on May 5, 1898, sold her entire stock to defendant R. H. White for \$1,600, taking his notes for the same, payable in six installments of \$266.66 $\frac{2}{3}$ each, due in two, four, six, eight, ten, and twelve months.

Complainant claims to be a corporation doing a wholesale millinery business in St. Louis, Mo., and as such sold to the defendant, for her business, goods to the amount of \$1,350. For \$1,300 of this amount she gave her notes, and the balance was claimed to be due by account. There were five notes executed by defendant, F. E. Bowers, March 15, 1897, aggregating \$1,300. She was, when she executed these notes, a married woman. They do not purport to bind her separate estate, nor is there any contention that she agreed orally to bind any separate estate for them.

The bill charges that in April, 1898, Mrs. Bowers agreed to pay these notes, as well as upon other occasions, but that she failed to do

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so, and on the 5th of May, 1898, she made this fraudulent conveyance to White, taking notes therefor, and that the notes are in her possession.

An injunction was prayed for, and issued, to restrain Bowers and wife from collecting or transferring, and defendant, White, from paying, the notes, except under the orders of the Court, and the effort is to have the amount owing by White applied to the payment of complainant's debt. No personal judgment is asked against J. E. Bowers, nor against White, and he is only sought to be required to pay the notes. The goods are not attached, but it is asked that they or their proceeds be applied to complainant's debt.

Mrs. Bowers answered and plead her coverture, and denied that she promised to pay the notes in April, 1898, and contests all liability on the notes; denies that the sale to White was fraudulent, and states that she transferred his notes to the bank to secure certain of her creditors, before the bill was filed or injunction was granted, and had secured no personal benefit from the sale, but has applied the whole amount received to payment of her debts.

White answers, and denies all knowledge of complainant's debt and all charges of fraud in the sale, and states that he is good and solvent for the amount of the notes, and states that he had been notified of their transfer to the bank before service of injunction on him.

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The Chancellor refused to give any personal judgment against Mrs. Bowers, on account of her coverture, and he also refused any judgment against White, and these two rulings are assigned as error. The ruling of the Chancellor was correct in not giving judgment against Mrs. Bowers on her notes over her plea of coverture, unless a new promise made by her since the passage of the Act of April 30, 1897, would render her liable. The substance of this Act is to make married women engaged in mercantile and manufacturing business liable for their debts incurred in such business.

We think the evidence is not sufficient to show anything more than a simple recognition of the existence of the original notes after the passage of that Act, and does not amount to a promise to pay them, if such a promise could give vitality and force to notes which were not binding when made before the passage of the Act. There were some propositions pending to substitute other notes for the original one, but the matter was not consummated, and the notes still stand in their original shape as when first made.

This being the status of the case, the only remedy of the creditor against Mrs. Bowers, even if she had not sold to White, and had the goods still in her possession, would be to reclaim such of the goods sold her by complainant as could be identified and seized in stock, and this upon

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the idea that the contract, having been avoided by her, was of no further force and effect, and therefore the creditor could reclaim such of his goods as he could seize and identify as his own, but he would have no recourse against other goods that might be in stock bought from other persons, nor could he hold the married woman liable for such as she may have sold. *Federlicht v. Glass*, 13 Lea, 481; *Theus v. Dugger*, 9 Pickle, 46, 50. The bill in this case is not filed upon the theory, nor does it proceed upon the idea of following up the specific goods in the hands of White and reclaiming them in kind as the property of complainant, and we need not consider whether that could have been done or not. The theory of the bill is that complainant has a valid, enforceable debt against Bowers and wife, he having indorsed the notes of his wife, and, having such debt, it has a right to impound the amount due her from White, and subject the same to the payment of its debt. But the complainant has no valid, enforceable debt against Mrs. Bowers, arising out of the original execution of the notes, nor the incompleted and unfinished negotiations, to substitute other notes therefor, and its right to hold White liable upon his purchase of the goods, either upon the ground of fraud in the purchase of the goods or because he is indebted to Mrs. Bowers, must rest, if at all, upon the validity of his claim against Mrs.

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Bowers. In addition to this, it appears that these notes were transferred to the bank before injunction granted or bill filed, so that we are unable to see upon what ground complainant can recover against either Mrs. Bowers or White.

The decree of the Court below is affirmed, with costs.

Montgomery v. Lipscomb.

MONTGOMERY v. LIPSCOMB.

(*Jackson*. June 25, 1900.)

1. **BOUNDARY.** *Burden of proof.*

The burden is on the defendant in ejectment to locate the lines of his superior conflicting title. (*Post*, pp. 145, 146.)

2. **SAME.** *Evidence of.*

It is competent to establish the location of beginning corners and boundary lines by proof of general reputation, or by proof of declarations of former owners, made while in possession, and of surveyors. (*Post*, pp. 147, 148.)

Cases cited: *Beard v. Talbot*, Cooke, 142; *Sims v. Dickson*, Cooke, 137; *Holland v. Overton*, 4 Yer., 485; *Davis v. Jones*, 3 Head, 603; *Lannum v. Brooks*, 4 Hay., 122.

3. **SAME.** *Call to run with another line.*

A call "to run 96 chains with A. B. H.'s line" does not necessarily stop at the end of A. B. H.'s line short of 96 poles. (*Post*, pp. 150, 151.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

CARROLL & McKELLAR for Montgomery.

J. H. MALONE for Lipscomb.

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WILKES, J. The original bill in this case is to recover two tracts of land on Cow Island, in the Mississippi River, one containing 53 acres and the other 216 acres.

There was an answer and cross bill, and the pleadings took such shape that there was a disclaimer to the 53 acres, and as to all of the 216-acre tract except 115 acres, and as to this there was a prayer that defendant's title should be decreed good and all clouds should be removed therefrom. There was a trial in the Court below, and the complainant's bill was dismissed as to the 115 acres, and defendant's title as to that was pronounced perfect, and all clouds removed. Complainant has appealed and assigned errors. It is conceded that defendant has the older and better title, and that it is not defective if it covers the land in controversy, but it is insisted that it does not so cover the land in dispute. The question then resolves itself into one of boundary, and this turns upon the location of the beginning corner. It is conceded that if the beginning corner is at the point contended for by defendant, then there is an interlap of two grants over the disputed territory, and defendant's, being the older, forms the basis for the better title. Defendant's grant was issued in 1878, upon a survey made in 1874, and complainant's grant issued in 1885. In this aspect of the case, the burden of proof rests upon the defendant to establish his corners,

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especially the beginning, and to locate his lines, so far as they touch the disputed territory. Defendant holds and claims under what is called the Tweedle grant, which describes the land as follows:

“Beginning at a stake with two cottonwood pointers, where the west line of A. B. Haynes’ survey strikes the bank of said (Mississippi) river, thence south with said Haynes’ west line ninety-six chains to a stake, thence west sixty-two chains to a point on the bank of the Mississippi River, thence up said river, with its meanderings, to the beginning, containing 160 acres of land.”

It appears that Mrs. Tweedle was living in some cabins on the land in 1850, and exercising such acts of ownership over it as to cut and sell wood from it to steamboats plying the river. She died in possession in 1882, and her two daughters succeeded to the possession in 1882, and continued in possession until 1885, when they conveyed the 160 acres, with all its accretions, to Lipscomb, the defendant, and he has been in possession ever since. It will be seen that the beginning point is located by two references, or means of identification, one being a corner fixed by two cottonwood pointers, and the other fixed as to the point where the west line of A. B. Haynes’ survey strikes the bank of the Mississippi River. Mrs. Young, one of the daughters of Mrs. Tweedle and one of the former owners

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of the land, says that the corners of the land were marked when the Tweedle survey was made, in 1874, and she was then living on the land; that the surveyor and his assistant drove down mulberry stakes at the corners, and that the beginning stake was near the two cottonwood pointers called for in the grant; that these were shown to her by her mother as the beginning corner, and the stake and pointers were in place when she and her sister sold and conveyed to Lipscomb in 1885, and so was the stake at the southwest corner.

Mike Taughey stated that he went to live on the place in 1876, and that the stakes and cottonwood pointers were then shown to him as the beginning corner, and were pointed out to defendant when the sale was made to him, as well as the southwest and southeast corners. Defendant stated that he lived on the land eleven years, knew exactly where the cottonwood pointers were, and that their location was shown to him by the surveyor and Humphries, and that the stump of one of the trees was still to be seen. He also testified to marked lines, and that one line ran south of and near to the Tweedle cabin. This latter fact was testified to by Mrs. Young, by Taughey, Lipscomb, and Richardson.

It is said that evidence showing where former owners now dead said the line ran is hearsay, but it is well established that evidence of a gen-

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eral reputation is admissible to establish beginning corners and boundary lines. *Beard v. Talbot*, Cooke, 142; *Sims v. Dickson*, Cooke, 137; *Holland v. Overton*, 4 Yer., 485; *Davis v. Jones*, 3 Head, 603.

In *Davis v. Jones* it is held that declarations of a former owner in possession, whether dead or alive, are admissible to show corners of a grant. *Davis v. Jones*, 3 Head, 606. And so may the declarations of a surveyor as to where lines were located. *Loune v. Brooks*, 4 Hay., 122.

The other locative call is where Haynes' survey strikes the bank of the river. This survey was made in 1870, or four years before the Tweedle survey, and refers to the original field notes of the Chickasaw cession survey, which embraces this land. This was a government survey, and its calls are well known. These field notes and plats of the original surveyor are made the primary and best evidence by the statutes of the United States. 2 Am. & Eng. Enc. Law, 502. It is also shown by the evidence that Kirk, the surveyor of this grant, had before him and conformed to the cession survey, thus fixing with much certainty this point. Watkins, a witness for complainant, says that he went to this point in 1894 with Major Humphries, and saw not only a stake, but trees marked as pointers, but in his opinion they were not the original pointers. Major Humphries, however, who made the survey

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with him and kept the field notes, insisted that the trees were those referred to in the Tweedle grant. The evidence of this witness, together with the plat made part of his deposition, shows that he examined the calls of the cession grant in connection with this grant, and he locates it as defendant claims. It does not appear that any actual survey was ever made known as the Haynes' survey, and it is plain that it was located by this government or Chickasaw survey. Marked lines are also shown to have been on the south boundary, and this being located fixes the location of the beginning corner in the same place as the other tests.

The location of the Tweedle cabins is also strongly persuasive, if not conclusive, of the location of the Tweedle land. According to the calls and plats of defendants, their cabins are only a short distance north of the southern boundary line, but according to the contention of complainant, they would not be on the Tweedle land at all, but would be about a half mile outside of his grant.

It is not probable that she, living on this land for a lifetime, and having it surveyed with care, and the corners located, would so run and mark a line as to leave her home not embraced in the boundaries, but a half mile beyond them.

The contention of the complainants is that much of the northern part of the Tweedle land has

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been washed into the river, and that Lipscomb, beginning on what is now the bank, necessarily goes too far south and interlaps on Montgomery's grant. Two witnesses, Miller and Montana, are examined to prove this, and they state in a general way that the towhead of this island has changed from time to time, but they do not agree as to what the changes are, and they know nothing as to the location of the Tweedle grant, and they say that there have been, also, accretions to the island. A witness, Mr. Geo. W. Speer, says he was never on the island, but he makes some plats and maps from papers in the abstract office at Memphis, but he fails to show any deed to base his plat upon, and could only find another map, made for other parties in 1880 by Mr. McOmber, who had before him the same evidence as the witness had.

Mr. Watkins testifies that he never saw the premises until 1885, or eleven years after the Tweedle grant was surveyed, and never at any time surveyed it, but did survey an adjoining tract with Humphries in 1894, who is the same witness who speaks with so much certainty as to the overlap. He says, however, that, with the notes of the Chickasaw survey before him, any surveyor could locate the point. He thinks the trees and stakes were not there, but Humphries, who was with him, says they were.

It is agreed for complainant that the Tweedle

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grant calls to run 96 chains with A. B. Haynes' line, and this means that the 96 chains must necessarily be all the way upon such line. While the language is susceptible of this meaning, it may be that the line ran with Haynes' line so far as it went, but was to continue 96 chains, whether the line was that long or not. We do not attach much importance to this language, and think it susceptible of either construction, and upon this the strength of complainant's claim mainly rests. There is some conflict of evidence between defendant and complainant and defendant and Watkins which we cannot reconcile.

We think the great weight of evidence is with defendant's contention, and he has satisfactorily located the beginning corner as he claims, and is entitled to the land as claimed, and the decree of the Chancellor is affirmed, with costs.

Simmons v. Bailey.

SIMMONS v. BAILEY.

(*Jackson*. June 25, 1900.)

1. ASSIGNMENT OF ERROR. *Insufficient, when.*

An assignment of error is too general and indefinite, and is bad, which merely avers that the allegations of the bill are not sufficient to entitle complainant to relief, without specifying any defects in the bill. (*Post*, pp. 155, 156.)

2. VENDOR AND VENDEE. *Defense to enforcement of vendor's lien ineffectual, when.*

A vendee, in undisturbed possession of land, under a general warranty deed made by a vendor whose solvency is not impeached, cannot successfully defend a bill that seeks to enforce the vendor's lien, by sale of the land, for the purchase price, by interposing a cross bill, averring, in general terms and without any specification whatever, that the vendor's title was defective, that he made false representations in effecting the sale, and that he had failed to furnish a perfect abstract of the title, as stipulated. (*Post*, pp. 153-156.)

Cases cited: *Clark v. Carlton*, 4 Lea, 458; *Fort v. Orndorf*, 7 Heis., 169; *Jones v. Fulghum*, 3 Tenn. Ch., 200.

3. SAME. *Burden on vendee to show defects in title, when.*

A vendee, in possession of land, under a deed with covenants of warranty made by a vendor whose solvency is not impeached, must, if he seeks to avoid his contract on account of defective title, not only aver the specific defects relied on, but the burden is upon him to prove their existence. The rule is otherwise in cases of executory contracts. (*Post*, pp. 156-158.)

Cases cited: *Topp v. White*, 12 Heis., 180; *Boyer v. Porter*, 1 Tenn., 258; *Mullins v. Aiken*, 2 Heis., 535; *Cunningham v. Sharp*, 11 Hum., 116; *Senter v. Hill*, 5 Sneed, 505; *Ingram v.*

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Morgan, 4 Hum., 66; Young v. Butler, 1 Head, 640; Land Co. v. Hill, 87 Tenn., 598.

FROM FAYETTE.

Appeal from Chancery Court of Fayette County.
JOHN S. COOPER, Ch.

H. C. MOORMAN for Simmons.

M. C. KETCHUM for Bailey.

WILKES, J. The original bill in this case was filed to enforce a vendor's lien for unpaid purchase money.

There was an answer filed as a cross bill, in which the defendant set up a defect of title and failure to deliver a perfect abstract, as was stipulated for in the contract, and fraudulent representations as to title. There was a demurrer to the cross bill upon the ground that it failed to point out wherein the title was defective, or in what the false representations consisted, or wherein the abstract was defective. This demurrer to the cross bill was sustained, and it was dismissed. Under the original bill the lien was declared, the amount of the debt was ascertained, and the land was ordered to be sold to satisfy the balance of the purchase money.

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The defendant to the original bill, being the complainant in the cross bill, has appealed and assigned as error the dismissal of the cross bill and refusal to grant relief thereunder. The cross bill alleges that the land was purchased, a cash payment was made, and notes executed for the balance; that a warranty deed was executed to the purchaser, and that he was in possession of the premises. It does not allege that the complainant vendor is insolvent, or that there has been any eviction or any action to disturb the defendants' possession. It does allege that when the contract was made the vendor represented that the title to the land was perfect, and agreed to furnish a full, complete and perfect abstract; that he delayed furnishing the abstract until just before the suit was brought; that defendant, on receiving it, immediately submitted the same to counsel and was advised that the chain was incomplete, and the title was not perfect; that he at once notified complainant of these facts, but he had made no effort to remedy the defect, and defendant thereupon returned the abstract to complainant and rejected the same. The cross bill also charges that complainant knew his title was defective when he made the contract, and thereby perpetrated a fraud upon the defendant. The cross bill alleges in a general way, and incidentally rather than specifically and directly, that the title is not good, but there is no specification of

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any defect, and no statement of how or in what manner the title is defective or the abstract is incomplete.

The demurrer is, in substance, that the cross bill shows the defendant in possession under a general warranty deed, and without any allegation that his title or possession has been disturbed or questioned, or that the complainant is insolvent, and wholly fails to designate or charge in what respect the title is defective.

The errors assigned are that the cross bill alleges fraudulent misrepresentations as to title; that there are material defects in the title; that a complete and perfect abstract has never been delivered, and it is further assigned as error that a decree was rendered against defendant, Harriet A. Bailey, ordering the land sold, when the allegations in the bill were not sufficient to entitle the complainant to such relief. The last assignment is too indefinite, inasmuch as it does not allege in what respect the allegations of the bill were not sufficient, and the brief filed with the assignment does not make the statement any more specific. It does not appear that any personal decree was taken or sought against Mrs. Bailey, who is a married woman, but the amount of unpaid purchase money was declared and fixed, and a sale was ordered to satisfy the same, and unless some defense appears from the matters set up in the cross bill, we see no reason why the

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decree rendered for the sale of the land was not authorized under the pleading.

The charge in the cross bill is made in the most general terms that the title is not good, without averring in what respect it is not perfect, and it does not aver that there is any adverse claim or outstanding title, or incumbrance or cloud upon the title, or that complainant is insolvent, but it shows defendant in undisturbed possession under a general warranty deed. The averment is not even specific that there is a defect in title, but simply that counsel has given an opinion that the chain is not complete.

"A mere averment that there are defects of title, without stating facts from which the Court can see that defects do exist, is, of course, mere sound, signifying nothing." *Clark v. Carlton*, 4 Lea, 458; *Fort v. Orndorf*, 7 Heis., 169; *Jones v. Fulghum*, 3 Tenn. Ch., 200.

It is said that when there is a defense of want of perfect title, the burden of proof is on the vendor to show his title perfect, and not upon the vendee to point out the defects. This, we take it, is a correct rule in cases of executory contracts. For instance, when a bond to make title has been given, and the vendee defends upon the ground that the title offered is not perfect. The rule in such case is laid down in *Topp v. White*, 12 Heis., 180, as follows:

"The vendor's muniments of title are supposed

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to be in his own possession, and he should exhibit them when called upon; the purchaser cannot be expected to hunt up the links of title from the public records. The vendor, by his contract to convey, represents himself as having title, and he must show this to be so; he holds the affirmative of the issue. The rule must apply when a rescission or specific execution is sought." To the same effect, see *Boyer v. Porter*, 1 Tenn., 258; *Mullins v. Aiken*, 2 Heis., 535; *Cunningham v. Sharp*, 11 Hum., 116. But a different rule prevails when the contract has been executed and the purchaser is in unquestioned possession under a deed with covenants of warranty from a vendor who is not alleged to be insolvent. *Topp v. White*, 12 Heis., 175; *Senter v. Hill*, 5 Sneed, 505; *Ingram v. Morgan*, 4 Hum., 66; *Young v. Butler*, 1 Head, 640; *Land Co. v. Hill et al.*, 3 Pick., 598.

In cases of executory contracts, the bill becomes essentially, on the part of the defendant, an effort to enforce specific performance of an agreement to make a perfect title or to rescind the contract, if the vendor is unable or fails to make such title. In such case, the authorities hold that it is not essential for the vendee to point out the defects in the title offered by the vendor, but it is incumbent on the vendor to tender a perfect title, and the onus is upon him to show it to be so; and the purchaser will not be required

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to complete the contract and accept the title unless it is shown to be perfect.

We do not, under the facts of this case, consider this as an executory, but as an executed contract, and there should be some allegations of some specific defect of title made in the cross bill, or some specific charge of fraudulent misrepresentation, in order to give relief. We think the demurrer is broad enough to reach the failure to make a specific charge of fraudulent representation, though it might have been more pointed, direct, and definite on this feature of the case. There is no reversible error in the decree of the Court below, and it is affirmed. The appellee will pay costs of appeal, and the cause is remanded for further proceedings.

Newbern v. McCann.

NEWBERN v. McCANN.

(Jackson. June 25, 1900.)

1. MUNICIPAL CORPORATIONS. *Power of, to regulate saloons.*

A municipal corporation has undoubted power, by reasonable ordinances, to regulate the mode and manner in which the sale of intoxicating liquors may be made and that privilege exercised within its limits, including the power of reasonably partial or qualified prohibition of sales, where its charter, in addition to conferring the usual powers granted to municipal corporations, authorizes it specially to license, tax, and regulate merchants, peddlers, and all privileges taxable by the State, and to pass all by-laws and ordinances necessary to enforce the powers granted, and to impose fines. (*Post*, pp. 160, 161, 164.)

2. SAME. *Ordinance requiring closing of saloons on Sunday.*

Ordinances that are not unreasonable and oppressive, requiring the closing of saloons on Sunday, are valid and enforceable; but an ordinance that contains an absolute prohibition against opening saloons on Sunday by the owner or his employees without written permission of the Mayor or the Recorder, is, in its application to openings in cases of necessity or emergency, oppressive, unreasonable, and void. Undoubtedly the owner of a saloon may be forbidden to open his saloon on Sunday, except in cases of necessity, emergency, or for other like innocent purpose. (*Post*, pp. 161-166.)

Cases cited: *McKinney v. Nashville*, 96 Tenn., 79; *Smith v. Knoxville*, 3 Head, 245; *Maxwell v. Jonesboro*, 11 Heis., 257; *Ward v. Mayor*, 8 Bax., 228; *Grills v. Jonesboro*, 8 Bax., 247.

3. SUNDAY. *Laws and ordinances enjoining observance of, upheld.*

Laws and ordinances enjoining observance of the Sabbath have been uniformly upheld by this Court. (*Post*, p. 164.)

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Cases cited: *Breyer v. State*, 102 Tenn., 110; *McNeill v. State*, 92 Tenn., 720; *McKinney v. Nashville*, 96 Tenn., 79; *Johnson v. Chattanooga*, 97 Tenn., 248.

FROM DYER.

Appeal in error from the Circuit Court of Dyer County. THOS. J. FLIPPIN, J.

S. L. COCKROFT for Newbern.

DRAPER & RICE for McCann.

WILKES, J. This case originated in the Mayor's Court of the town of Newbern, and comes to this Court from the Circuit Court of Dyer County, on the appeal of the Mayor and Aldermen. The defendant was fined by the Mayor of Newbern \$25 for the violation of an ordinance of the town. The case, on appeal to the Circuit Court, was tried by the Court without a jury, and that Court found in favor of the defendant, released him from the fine, and taxed the Mayor and Aldermen with the costs of the suit.

Under the Act of 1887, the Mayor and Aldermen of Newbern are authorized to license, tax, and regulate merchants, peddlers, and all privileges taxable by the State, and are authorized to pass all by-laws and ordinances necessary to en-

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force the powers granted, and have all the rights, privileges, and powers which are granted and conferred by law upon municipal corporations of a like kind in the State, and the right to impose fines is expressly named.

The ordinances called in question in this case as being unwarranted by the charter and unreasonable in their provisions are as follows:

“Section 9. *Be it further ordained*, That no licensed grocer, or saloon keeper, or other persons shall retail any malt, fermented, or spirituous liquors, or any intoxicating liquors, on Sunday, nor shall any such person or persons keep open on Sunday any place where such liquors are sold or dispensed within the corporate limits of the town of Newbern. Any person or persons violating this ordinance shall be fined not less than \$25 nor more than \$50. . . .

“Section 12. *Be it further ordained*, That it shall be unlawful for the proprietor of any saloon, or place where intoxicating liquors are sold or dispensed, his clerks, agents, or employees, to enter on Sunday, for any purpose, any such saloon, or place where intoxicating liquors are sold or dispensed, without first obtaining a written permission from the Mayor or Recorder of the town of Newbern, which said permission shall be reduced to writing, dated, and signed by the Mayor or Recorder, stating the length of time said person may remain in said saloon or place where intox-

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icating liquors are sold or dispensed, and shall be good and valid only for that day, and for the time specified therein, and any such persons in possession of said permission shall exhibit the same to the Marshal of the town on his demand, and on a refusal to do so, shall subject himself to the same penalty as if he had no such permission; *Provided however*, That the granting of such permission shall not be so construed as to give proprietors of saloons, their agents, employees, or clerks, any right or authority to do or transact any kind of secular business whatever while in said place of business and acting under said permission. Any person or persons violating the provisions of this ordinance shall be fined not less than \$25 nor more than \$50."

It was under this latter section that the defendant was convicted and fined, and it is the only one now brought in question.

The facts were agreed upon, and are as follows: The defendant was the keeper of a saloon, and engaged in that occupation in Newbern as his sole and only business. He went into his saloon on Sunday, the 10th day of December, 1899, twice, unlocking and entering by his front door, the saloon being located on Main Street. He remained in his saloon and place of business, where he usually, on secular days, sold and dispensed intoxicating liquors, on such occasion five or ten minutes each. There was no other person with

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him, and none other entered while he was in the saloon. The first visit was to get a half pint of whisky for his bartender, who was at the time sick at defendant's house, where defendant was waiting on him, and he went for and procured the whisky for the sick man at the suggestion and recommendation of Dr. Cole, a regular, practicing physician, who was attending as such upon the sick man, and this was the sole and only purpose of getting the whisky out of the saloon at that time, and he did not charge for said whisky, and never intended to do so.

Upon the second occasion, on same day, he went into the saloon merely for the purpose of getting a piece of ice for the same sick man, there being no other place in the town at which it could be procured at that time, except in the saloons, and on this occasion no other person went into the saloon with him, or came in while he was there, and upon neither occasion was any other person in the saloon while he was in it, and he went in only for the purpose mentioned, and remained not longer than five or ten minutes, and the front door on each occasion was closed, except at the time he was going in or coming out. He did not, on either occasion, when entering the saloon, have any written permission from the Mayor of Newbern, who lived only about one hundred yards from the saloon,

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nor from the Recorder of the town (as required by the ordinance), to enter his saloon upon that particular Sunday, and defendant stated "that he would go into his saloon on Sunday whenever he wished to do so, and without asking permission of any one."

There can be no doubt that, under its charter, the town of Newbern can regulate the mode and manner in which the sale of intoxicating liquors may be made, and the privilege exercised, and this embraced the power of reasonably partial or qualified prohibition. 1st Dillon on Municipal Corp., Sec. 292, 2d Ed.; *Mayor v. Linck*, 12 Lea, 507, 514; Horr & Beames on Public Ordinances, Sec. 30.

Laws and ordinances enjoining the observance of the Sabbath are uniformly upheld by this Court. *Breyer v. The State*, 18 Pickle, 110; *Indefield v. The State*, 22 L. R. A., 721; *McNeill v. The State*, 8 Pickle, 720; *McKinney v. Nashville*, 12 Pickle, 79, 81; *Johnson v. Chattanooga*, 13 Pickle, 248.

Ordinances may be passed regulating the retailing of liquors and the opening and closing of saloons, and if they are reasonable, and not oppressive, they will be maintained. *Smith v. Knoxville*, 3 Head, 245; *Maxwell v. Jonesboro*, 11 Heis., 257; *Ward v. Mayor*, 8 Bax., 228. But not if unreasonable and oppressive. *Grills v. Jonesboro*, 8 Bax., 247.

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The objection to the ordinance in this case is, that there is an absolute prohibition against the owner or employee entering the saloon on Sunday for any purpose; and, again, that permission to enter in cases of necessity or emergency is made to depend upon the consent of the Mayor or Recorder, and gives room for an arbitrary discrimination on the part of the authorities of the municipality. This feature of the case is presented and commented on in *Richmond v. Dudley*, 13 L. R. A., 587, and a large number of cases there cited, and is also forcibly commented on in *Yickwo v. Hopkins, Sheriff*, 118 U. S., 356, and *Baltimore v. Radecke*, 49 Md., 217.

We are of opinion the trial Judge was correct, upon both authority and reason, in holding this ordinance invalid. It is an unreasonable ordinance which provides that a man, though he may be a saloon keeper and carry on the business of selling intoxicating liquors, may not for any reason enter his saloon or place of business on Sunday. He may be prohibited from keeping it open or selling any liquor, or carrying on his usual business, or winding up that already done, or letting others into the saloon.

As was said in *McKinney v. Nashville*, 12 Pickle, 79, we do not hold that the proprietor or employees or family may not enter the saloon as proper occasion may demand on Sunday, but they cannot engage in work pertaining to the sa-

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loon or the business, or allow others to enter it or remain in it.

There are many occasions when a keeper of a saloon may enter it on Sunday from necessity, or upon an emergency, as to guard against fire or burglary or to protect his house from damage as the results of rains or storms, or his goods from loss from sudden leakage, and many other matters which present cases of emergency and necessity. When such occasions arise, it is unreasonable to require that the owner or employee must first find the Mayor or Recorder and get their permission to enter for such purposes. This discretion given to the Mayor or Recorder to decide whether the case is one of necessity or emergency, and to grant or refuse the request, is one which must also vitiate the ordinance when taken in connection with the other general and absolute prohibition.

We are of opinion, therefore, that the trial Judge was correct in his judgment, and it is affirmed with costs.

Telegraph Co. v. Frith.

TELEGRAPH CO. v. FRITH.

(Jackson. June 25, 1900.)

1. NEGLIGENCE. *Evidence of, in delivery of telegram.*

In an action against a telegraph company for negligence in delivery of a message, it is competent for plaintiff to show that he sent a second message to the company's operator urging prompt delivery of the first message. (*Post*, p. 171.)

2. TELEGRAPH COMPANY. *Degree and measure of liability for negligence.*

Telegraph companies, like common carriers, are public servants, and held to a very high degree of diligence and a strict discharge of duty. For violation or negligent performance of duty they are liable not only for the pecuniary loss inflicted, but also for such further sum as will compensate for the mental anguish, grief, and disappointment suffered by the injured party, and, in proper cases, an additional amount may be allowed, in the discretion of the jury, as punitive damages. (*Post*, pp. 171, 172, 176.)

Cases cited: *Marr v. Telegraph Co.*, 85 Tenn., 529; *Wadsworth v. Telegraph Co.*, 86 Tenn., 695; *Telegraph Co. v. Mellon*, 96 Tenn., 66; *Jones v. Telegraph Co.*, 101 Tenn., 442; *Railroad v. Griffin*, 92 Tenn., 694; *Telephone Co. v. Robinson*, 97 Tenn., 638.

3. VERDICT. *Remittitur allowable, when.*

When the objection is not to the fact of a verdict, but to its excessiveness, it may be obviated by remittitur of the excess, even in cases of tort, and when the excessiveness has been the result of passion, prejudice, caprice, or corruption on the part of the jury. (*Post*, pp. 172-174.)

Cases cited: *Jenkins v. Hawkins*, 98 Tenn., 551; *Branch v. Bass*, 5 Sneed, 366; *Railroad v. Jones*, 9 Heis., 27; *Young v. Cowden*, 98 Tenn., 589; *Massadillo v. Railroad*, 89 Tenn., 662.

4. SAME. *Not excessive, when.*

A verdict of \$1,900, reduced by remittitur to \$1,000, rendered against a telegraph company for its grossly negligent and inexcusable failure to deliver to the plaintiff a message inform-

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ing him of the sudden death of his seven-year-old child, at a distant but accessible point, where his wife and child were visiting relatives, will not be disturbed for excessiveness where it appears that plaintiff could and would have been able to reach the point in time to be present at the burial of the child if the message had been promptly delivered, and that the company's agent received the message in due time, but deposited it in his pocket and carried it four days, forgetting that he had it, and failed to deliver it, though plaintiff lived only a few hundred yards away. These facts make a case for the allowance of punitive damages. (*Post*, pp. 174-176.)

FROM FAYETTE.

Appeal in error from Circuit Court of Fayette County. THOS. J. FLIPPIN, J.

JAS. M. GREER for Telegraph Co.

H. C. MOORMAN for Frith.

WILKES, J. This is an action for damages against the telegraph company for negligence in the delivery of the following telegram:

"HAZEN, ARKANSAS, July 11, 1899.

"To R. A. Frith, Somerville, Tenn.:

"Little Robert died this morning. Come at once; waiting here for you.

"(Signed)

W. K. BACON."

Plaintiff, Frith, lived in Somerville, Tennessee, with his wife and one child, Robert. His dwell-

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ing was within the corporate limits of the town and about four hundred yards from the office of the telegraph company. His wife's father lived at Des Arc, Arkansas, and she, with her little child, Robert, about seven years old, had a few days prior to July 11, 1899, gone there to visit her father and relatives. The child became ill on the 5th of July and died on the morning of Tuesday, July 11. W. K. Bacon, the brother-in-law of the wife, went to Hazen, a station on the Little Rock & Memphis Road, about fifteen miles from Des Arc, it being the nearest telegraph office, and sent the telegram above set out, between 2 and 3 o'clock in the afternoon, paying the charge for transmission and delivery; about 8 o'clock in the evening returned to the office, and, upon ascertaining that the operator had heard nothing of the delivery of the message to plaintiff, sent another telegram to the operator at Somerville, requesting that the first one be delivered without delay, and paid also for this latter telegram.

Mr. Bacon remained at Hazen until after the arrival of the train from Memphis (the next day), upon which Mr. Frith was expected to come in response to the telegram, and when he did not come, and he did not hear from him, he returned to Des Arc, and, Mr. Frith not coming and not having been heard from, the child was buried. It is shown that the operator at Somerville received the message at 4:40 on the

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afternoon of July 11, 1899, and Frith was then in Somerville, and the operator knew him and where he resided, and had delivered telegrams to him at his residence on other occasions. Frith remained at his residence that night, and the next day was at work in Somerville near the public square until 4:45 in the afternoon, when he went out to work at Jackson's, some eight miles in the country, and remained until the afternoon of Saturday, the 15th, when he returned, and through the mail received a letter from his wife, informing him of the death of his child, Robert. Soon thereafter a friend told him there was a message for him at the telegraph office. He telephoned to that office and inquired if there was a telegram there, and the operator answered there was, and to come and get it and he would explain why it had not been delivered earlier. About 6 o'clock in the evening the operator found the plaintiff at a store up-town, and explained to him that he had put the telegram in his pocket after receiving it, intending to deliver it when he came up-town, as he usually did in the evening. When he came up-town he forgot all about the telegram, and did not think of it again until Frith telephoned to him about it, four days thereafter. It appears that the operator lived some 325 yards from the residence of the plaintiff. Frith, after receipt of the letter and telegram on Saturday, went to Des Arc. If

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the telegram had been delivered promptly, as it should have been, he would have been able to reach Des Arc before the burial of his child, by either of two roads from Memphis, and would have gone.

There was a trial before the Court and a jury, and a verdict for \$1,900, the amount sued for. Upon suggestion of the trial Judge, there was a remittitur of \$900 and judgment for \$1,000 and costs. Defendant, telegraph company, has appealed and assigned errors.

It is said it was error to admit evidence of the sending of the second telegram, as that was a separate and distinct matter. We think it was not error, but was pertinent to show the urgency of the sender of the message, and the negligence of the company in not delivering the original telegram, and this is true whether, as a matter of fact, the second message was or was not sent. The wording of the message carried with it notice of its importance and the necessity for immediate delivery. This was made still more prominent and important by the effort to trace it and procure its delivery. The sending of the second message bore directly upon the question of the defendant's discharge of duty and accentuated its negligence in that regard.

Telegraph companies, like common carriers, are public servants and held to a very high degree of diligence and a strict discharge of duty. *Marr*

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v. *Telegraph Co.*, 85 Tenn., 529; *Wadsworth v. Telegraph Co.*, 86 Tenn., 695; *Telegraph Co. v. Mellon*, 96 Tenn., 66; *Jones v. Telegraph Co.*, 101 Tenn., 442.

Having violated its duty and been negligent in its discharge, the company is liable in damages. These damages must be such as to reasonably compensate the party injured not only for his pecuniary loss, but also for the mental anguish, grief, and disappointment caused by the negligence. *Railroad v. Griffin*, 92 Tenn., 694; *W. U. Tel. Co. v. Robinson*, 97 Tenn., 638; *Jones v. Telegraph Co.*, 101 Tenn., 442.

It is said that, conceding this doctrine to be now established by the decisions of this Court, still the verdict in this case was so excessive as to indicate passion, prejudice, corruption, or caprice on the part of the jury, and it should, therefore, have been set aside and treated as void and a new trial awarded, and that it is an error such as is not, and cannot be, cured by a remittitur. The insistence is that when the verdict is based upon passion, prejudice, corruption or caprice, the proper remedy is not to remit, but to set aside the verdict altogether and award a new trial.

An ingenious and forcible argument is made, and it is not without authority, that in actions for personal injuries, when there is no fixed standard for the measure of damages, every verdict

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which is by the trial Court considered as excessive must be so deemed on account of passion, prejudice, corruption or caprice on the part of the jury, and that when a trial Court refuses to approve such verdict it can only be upon such ground. Even if this be conceded to be true, and if it be admitted that in the present case the trial Judge refused to approve the verdict because he deemed it to be so excessive as to indicate passion, prejudice, corruption or caprice, still the question remains, Should the verdict be set aside or a less amount approved and judgment rendered therefor upon a remittitur. Although a verdict may be the result of passion, prejudice, caprice or corruption, it is nevertheless a valid verdict until and unless it is set aside. If it is reduced by the trial Judge to such an amount as makes it a proper verdict on the facts of the case, and this is assented to by the plaintiff, it is purged of its taint, and judgment may be rendered for such reasonable amount without the necessity of another trial. This has been the practice and rule of this Court and the Court below for a long number of years, and we can see no reason why it should not apply in cases of tort as well as in cases of contract. It is true a plaintiff cannot be forced to remit, and if he protest and object the trial Court should not render judgment, but should grant a new trial. The trial Judge can only suggest, and if the plaintiff

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accept without protest or objection, then judgment may be rendered by the Court. *Massadillo v. The Ry. Co.*, 5 Pickle, 662.

There is a broad distinction between cases where the dissatisfaction is with the amount of the verdict and those where the dissatisfaction is with the fact that any judgment has been rendered. In the latter case, when the evidence does not, in the opinion of the Court, warrant any verdict, it should be set aside and no judgment rendered, but when the facts, in the opinion of the trial Court and of this Court clearly warrant some recovery, there is no reason why a judgment for a reasonable and proper amount should not be rendered upon the assent of the plaintiff to remit to such amount. *Jenkins v. Hankins*, 14 Pickle, 551. The rule of remittitur applies to actions for torts as well as to actions on contracts. *Branch v. Bass*, 5 Sneed, 366; *Railroad Co. v. Jones*, 9 Heis., 27; *Young v. Cowden*, 14 Pickle, 589.

The question then presents itself, Is the judgment for \$1,000, as rendered by the Court, warranted by the evidence? The record presents a case of the grossest negligence. The telegram bore upon its face notice of its importance and urgency. There was absolutely no effort to deliver it. That it should have been placed in the operator's pocket and forgotten for four days is utterly inexcusable. There are in all such cases several

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considerations which enter into the estimate of damages. They cannot be said to rest upon pecuniary considerations, for no money beyond the mere cost of the telegram is involved. But in this case we have the grief, disappointment, and mental anguish of a father for his only child, whose burial he was prevented from attending and superintending. In addition, we must look to the fact that he realized that the mother was left alone in her distress, and that he was deprived of the privilege of being with her and so far as he could mitigating her grief by ministering to her in the hour of bereavement, and this was a source of grief and disappointment to him. All of these considerations, added to the distress of the father and husband, are proper to be looked to not from the standpoint of sympathy for the unfortunate, but in estimating the grief and disappointment of the father over the situation in which he was placed by the failure to deliver the telegram. In addition, upon grounds of public policy, this servant of the public, which undertakes to perform offices of this character promptly, should be visited with punitive damages if it performs its duty in a manner so negligent and reckless of the rights of others as is shown in this case.

The company is properly punishable for its neglect of statutory and common law duty, and its liability is not measured by the compensation it

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has received, but on the one hand by its dereliction of duty and on the other by the grief, disappointment and injury to the feelings caused by the default of the company. Shannon, §§ 1837, 1838; *Wadsworth v. Tel. Co.*, 86 Tenn., 695; *Railroad v. Griffin*, 92 Tenn., 694; *Telegraph Co. v. Mellon*, 96 Tenn., 69.

We are of opinion there is no error in the record, and in view of the facts in this case the judgment is not excessive, and it is affirmed, with costs.

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THOMPSON v. STATE.

(Jackson. June 25, 1900.)

1. MISDEMEANOR. *Unauthorized disposition of corpse is.*

The unauthorized disposition and sale of the dead body of a human being for gain or profit is a common law misdemeanor of high grade and *malum in se*. (*Post*, pp. 180-182.)

2. SAME. *Unsuccessful attempt to dispose of corpse is.*

An attempt to make an unauthorized disposition and sale of the dead body of a human being for gain or profit is likewise a misdemeanor at common law. (*Post*, pp. 182, 183.)

Case cited and distinguished: *Whitesides v. State*, 11 Lea, 474.

3. SAME. *Employer and employee.*

Where employer and employee participate, as such, in the commission of a misdemeanor, they are joint principals. (*Post*, p. 185.)

Cases cited: *Atkins v. State*, 95 Tenn., 474; *Whitesides v. State*, 11 Lea, 474.

4. INDICTMENT. *Sufficient for attempt to sell corpse.*

An indictment for an attempt to sell a corpse is not objectionable as uniting several distinct offenses in one count, which avers that the corpse was delivered to one of the defendants, as an undertaker, for burial; that he and his co-defendant conspired not to bury, but to dispose of it for profit and gain to themselves, and that, thereupon, they packed it in a trunk and shipped it away for sale, etc. The true legal import of this indictment, disregarding superfluous narrative, is that defendants made a joint and unlawful attempt to dispose of the corpse for profit and gain to themselves, and this is sufficient. (*Post*, pp. 179, 180.)

5. PUNISHMENT. *How inflicted.*

Where a misdemeanor is punishable by both fine and imprisonment, or by either, it is competent for the Court, after the jury has imposed a fine, *e. g.*, of \$750, as was done in this

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case, to add, in his discretion, imprisonment, *e. g.*, eleven months and twenty-nine days, as was done in this case. (*Post*, p. 185.)

6. SAME. *Of joint offenses.*

Although defendants are jointly tried and convicted for their joint offense, it is proper to inflict separate punishment, and each must respond to and satisfy his own sentence. (*Post*, pp. 185, 186.)

FROM SHELBY.

Appeal in error from Criminal Court of Shelby County. L. P. COOPER, J.

JOHN T. MOSS and M. B. NORFLEET for Thompson.

Attorney-general PICKLE for State.

CALDWELL, J. Frank Thompson and E. D. Thompson are under conviction for a joint attempt to dispose of and sell for profit and gain to themselves the dead body of Jennie McGuire, a pauper, which was intrusted to them for burial; and the punishment assessed against each of them is a fine of \$750 and imprisonment in the county workhouse for the period of eleven months and twenty-nine days.

Having appealed in error, they seek a reversal for numerous reasons, assigned by their counsel. It is said, in the first place, that the indict-

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ment charges three separate offenses in one count —(1) failure to bury; (2) conspiracy not to bury, but to sell; (3) attempt to sell—and, hence, that the motion to quash should have been sustained in the lower Court and should now be sustained in this Court.

The indictment does state that the body in question was delivered to E. D. Thompson, County Undertaker, for burial; that he and Frank Thompson confederated and conspired not to bury, but to dispose of it for profit and gain to themselves, and that thereupon they packed it in a trunk and shipped it away for the purpose of sale, etc., yet the true legal import of the charge, when rightly interpreted, is that the two defendants made a joint and unlawful attempt to dispose of the body for profit and gain to themselves; that is the real gravamen of the State's action, so to speak, the other parts being in the nature of mere description or inducement, and largely unnecessary. It is an indictment on the facts of the case, with some superfluity of narration. The statement of the failure to bury the body is not to be taken as a separate and distinct charge, but rather as a mere narrative of a fact leading up to the offense of shipping the body away for unauthorized sale; and the other statement that the defendants confederated and conspired not to bury, but to sell the body, is only an over-formal charge of joint action on

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their part in the attempted sale, and not an independent charge of unlawful conspiracy. Then, does the indictment, so interpreted and limited, charge an offense cognizable in a Criminal Court? Confessedly, we are without a statute creating such an offense; hence, unless it existed at common law or can properly be evolved from the principles of the common law, either of which would be sufficient, it does not exist at all.

Civilized countries have always recognized and protected as sacred the right to Christian burial and to an undisturbed repose of the human body when buried.

The willful, unlawful, and indecent taking and carrying away of the dead body of an unknown person, with the intent to sell and dispose of the same for gain and profit, to the scandal and disgrace of religion and in contempt of the laws and customs of the realm, was held to be an indictable offense in *R. v. Gilles*, 1 Russ. on Crimes, 464. And the disinterment of the body of a human being for the purpose of dissection was held to be indictable at common law in *R. v. Lynn*, 2 T. R., 733; 1 Leach, 497, and in *Kanavan's case*, 1 Me., 226. These cases, and many others with kindred rulings, are cited and more elaborately stated on pages 391 and 392 of Roscoe's Criminal Evidence, on page 464 of 1 Russell on Crimes, and in note A, 42 L. R. A., 733. One of the other

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cases is more closely related to that now before the Court. Of it Roscoe says: "In *R. v. Feist*, Dear. & B. C. C., 500 (S. C., 27 L. J. M. C., 164), the defendant was the master of a work-house, and had lawful possession of the bodies of deceased paupers. He was in the habit of having the appearance of a funeral gone through, with a view of preventing the relatives requiring that the bodies should be buried without being subject to anatomical examination; and the jury found that but for that deception, the relatives would have required the bodies to be so buried. The bodies, instead of being buried, as was supposed by the relatives, were delivered to an hospital for the purpose of undergoing anatomical examination, and for this service the master received from the hospital a sum of money. The prisoner was found guilty of an offense at common law in disposing of a body for dissection," but the appellate Court, though approving that finding, held that he was protected by statute. Roscoe's Cr. Evi., 392.

Bishop, in the course of his chapter on "Protection to the Public Morals, Religion, and Education," employs the following language, namely: "Moreover, as tending to corrupt the public morals, and as disturbing the sensibilities of the people, are such acts as casting the dead body of a human being into the river without the rites of Christian sepulture; the stealing of a corpse; the digging of it up, where buried, or

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conveying of it away from the burial ground for sale or for dissection; and the selling, for dissection, of the dead body of a person capitally convicted and executed, when the sentence did not direct such disposition of it. These are all indictable offenses at the common law." 1 Bish. Cr. L., Sec. 950.

It is broadly stated by numerous authorities that every attempt to commit a felony or a misdemeanor, whether the attempted offense be such at common law or by statute, is itself a misdemeanor at common law. Clark's Cr. Law, 104; Roscoe's Cr. Evi., 282; Bish. Cr. Law, Sec. 683; 1 Russ. on Crimes, 47, and citations by all of them.

Bishop says, however, by way of exception or qualification, that "no mere attempt to commit some of the smaller misdemeanors is a sufficient dereliction from duty to be indictable" (Sec. 684), and that "some offenses cannot have the appendage of attempt because of their little magnitude." Sec. 687.

The substance of the rule enunciated in the second edition of the Am. & Eng. Enc. of Law, Vol. 3, pp. 252, 253, is that an attempt to commit a misdemeanor is not indictable at common law, when the offense attempted is merely *malum prohibitum*, but only when it is *malum in se*, and that some misdemeanors that are *mala in se*

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are of such a nature as not to admit of indictable attempts to commit them.

This Court held, in *Whitesides v. The State*, 11 Lea, 474, that an attempt to commit a misdemeanor that "is purely statutory" is not indictable at the common law.

But, without multiplying citations or dwelling further upon the contrariety of opinion in the particulars indicated, it may be safely stated that the authorities are harmonious on the proposition that the unauthorized disposition and sale of the dead body of a human being for gain and profit, is a common law misdemeanor of high grade, and *malum in se*, and that an unsuccessful attempt to commit that offense is itself a misdemeanor, indictable and punishable at the common law.

It follows, therefore, that the present indictment, which charges such attempt, and that only, is good, and that the motion to quash was properly overruled.

The other objections urged against the judgment below do not require elaborate consideration. Of those directed against the Court's rulings as to the admissibility of certain evidence and against the charge to the jury, it is sufficient to say, generally, that none of them present any reversible error.

The evidence of guilt on the part of each defendant is plenary. It shows that Jennie McGuire, a white woman and pauper, died in the

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poorhouse of Shelby County, Tennessee; that, after suitable preparation, her dead body was, by direction of the superintendent of that institution, delivered to the defendant, E. D. Thompson, as County Undertaker, for burial; that, thereafter, he and the other defendant, Frank Thompson, who was in his employment, placed the body in a short metal box, which, after sealing, they put in a trunk; that this trunk, when securely locked, and three others, each containing the dead body of a negro, similarly packed, were by them shipped to St. Louis, Mo., where the defendant, Frank Thompson, was apprehended by officers of the law with the four trunks and their contents in his charge, and whence they were to be transported, at his instance, to Keokuk, Iowa, under a fictitious name, but in fact for a certain person of that city who was to pay \$50 for each of the four bodies for purposes of dissection.

The defendants are not protected by Chapter 206 of the Acts of 1899, which provides for the disposition of certain unclaimed bodies, because they made no effort to comply with the requirements of that Act, but pursued their own course without reference to it. They are equally without the protection of the last clause of § 6775 of Shannon's Code, which authorizes dissection "by consent of relatives," for they had no such consent. The only surviving relative of Jennie McGuire, so far as known, was a brother residing

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in another State, and he seems to have been entirely ignorant of her death until after her body had been taken to St. Louis. The only authority the defendants had in respect of this body was to give it decent burial; and that authority was violated in the manner already stated, and that, too, long after E. D. Thompson had been admonished by a proper representative of the county that he had no right to sell for dissection bodies intrusted to him for burial.

It is of no legal consequence that Frank Thompson may have been but an employee of his co-defendant, nor that one of them may have done more than the other in unlawful effort to dispose of and sell this body, since the criminal law does not recognize the civil relation of principal and agent, and treats all participants in the commission of misdemeanor as joint principals. *Atkins v. State*, 95 Tenn., 474; *Whitesides v. State*, 11 Lea, 475.

The offense of which the defendants have been convicted is punishable by both fine and imprisonment, or by either (1 Bish. Cr. L., Sec. 719), and after the jury had found them guilty and assessed a fine against them, it was within the province of the trial Judge, in the exercise of a sound discretion, to superadd imprisonment as he did.

Though joint actors in the commission of the same offense, and jointly tried and convicted, it

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was proper that punishment be inflicted upon the defendants separately, as if each had committed the offense alone (1 Bish. Cr. L., Sec. 732); and each is bound to respond in full to his own separate sentence, satisfaction, in whole or in part, of that against one of them not satisfying that against the other one in any sense or to any extent.

Let the judgment be affirmed.

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MACHINE CO. v. COMPRESS CO.

(Jackson. June • 26, 1900.)

1. SUPREME COURT. *Will not set aside verdict on the facts, when.*

Unless the complaining party can show that the strongest legitimate view, adverse to himself, of which the evidence is susceptible, affords no support to the verdict, this Court will not set it aside on the facts. (*Post*, pp. 194-200.)

Case cited: Citizens' Rapid Transit Co. v. Seigrist, 96 Tenn., 120.

2. EVIDENCE. *Photograph admissible.*

Photographs of a wrecked building and machinery, taken immediately after the explosion that caused the injury, are competent evidence to show the condition of the premises and the extent of the damage inflicted, in any case where these matters are the subject of inquiry. (*Post*, pp. 200, 201.)

Case cited: Bruce v. Beall, 99 Tenn., 309.

3. WITNESS. *Inquiry as to collateral matters for purposes of impeachment.*

The answer of a witness on cross-examination as to a collateral matter is conclusive and cannot be contradicted or disproved for the purpose of impeaching him. (*Post*, p. 201.)

4. DAMAGES. *Measure of, for breach of contract.*

Only such damages as result naturally and proximately are recoverable for breach of contract, but these may include (1) such damages as result immediately and in the usual course of things from the breach of the contract itself, and (2) such damages as result from the breach when considered in connection with the special circumstances which existed at the time the contract was made, and which, according to the understanding of both parties, entered into and became part and basis of the contract. (*Post*, pp. 201-217.)

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Cases cited: McDonald v. Unaka Lumber Co., 88 Tenn., 38; Railroad v. Cabinet Co., 104 Tenn., 568.

5. SAME. *Same.*

To render special circumstances existing at the date of making a contract part and basis of the contract, and a proper matter for consideration in estimating the damages for its breach, it is not essential that those circumstances shall be expressly referred to in the contract, whether it be written or oral, but it is sufficient if they were known to both parties, and that the contract was, to some extent, based upon them and made with reference to them. (*Post*, pp. 206, 207.)

6. SAME. *Same. Case in judgment.*

A manufacturer contracted to furnish machinery and make essential repairs upon the plant of a cotton compress company by a fixed date. The date fixed was, and was known by both parties to be, the beginning of the season, which continued during only a portion of the year, during which the plant could be operated. It was likewise known that it was the purpose and expectation of the compress company to have its plant in readiness for the beginning of the season. The manufacturer failed to complete the work within the time limited, and, when he did complete it, the work and material were of such inferior quality that an explosion resulted as a consequence, and so wrecked the compress plant that it could not be put in condition for operation during that season.

Held: The manufacturer was liable not only for damages to the plant from the explosion, and the loss of the price of the work he had done, but for the rental value of the plant during the season of enforced idleness. (*Post*, pp. 189-194, 207, 208.)

7. SAME. *Same.*

The rental value of a compress during the season of its enforced idleness is the true measure of damages against one whose negligence has wrecked it by explosion. (*Post*, p. 208.)

8. CHARGE OF COURT. *Does not leave construction of written contract to the jury, when.*

A charge of the Court is not objectionable as leaving the construction of a written contract to the jury, which merely in-

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structs the jury with reference to extrinsic circumstances constituting the basis of the contract which they should take into consideration in estimating damages for its breach. (*Post*, pp. 208, 209.)

FROM SHELBY.

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

McFARLAND & NEBLETT for Machine Co.

PERCY & WATKINS for Compress Co.

BEARD, J. The plaintiff in error, in the year 1897, was engaged in the iron foundry business in Memphis, Tennessee, and the Union Compress & Storage Co. owned at that time a plant erected at Clarksdale, Mississippi, for compressing cotton in bales for shipment to market. The power used by the latter company in doing this work was furnished by two sets of cylinders, in part steam and in part hydraulic, one of which was high and the other low pressure. In the winter of 1896-7 the low pressure hydraulic cylinder and some of the pipes communicating between it and the compress proper were permanently injured. This disabled the entire plant, and made it necessary for the compress company to have not only a new cylinder and new pipes, but also other

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parts of its machinery repaired in order to put the compress in working condition for the season of 1897-8, which began at that point about the 1st of October. To this end this company entered into a written contract with the Livermore Foundry & Machine Co., which is in the words following, to wit:

“AUGUST 17, 1897.

“This contract between the Livermore Foundry & Machine Co., of Memphis, Tennessee, and the Union Compress & Storage Co., of Clarksdale, Miss., witnesseth:

“That the said Livermore Foundry & Machine Co., for and in consideration of a sum of money, amount herein mentioned, agree to furnish the necessary labor and material for the repairs on the compress machinery, to wit:

“To furnish one new cylinder head, drilled and fitted per old one.

“To furnish one new piston head, fitted with packing rings and springs, with additional metal added.

“To furnish one new low pressure hydraulic cylinder.

“New special bolts for steam cylinder head and rear end of both hydraulic cylinders.

“To repair cracked steam cylinder in best possible manner and make tight.

“To reline high pressure cylinder with seamless drawn tube, so as to be true and smooth.

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"To furnish and set in place one piece of four-inch, extra heavy hydraulic pipe, 10 feet 9 inches long, and to bend same so as to conform to shape of old one.

"It is further agreed that the Livermore Foundry & Machine Co. shall take down and dismantle all above mentioned parts of machinery and ship same to Memphis without expense to the Union Compress & Storage Co., and upon completion of repairs at Memphis to return same to Clarksdale, Miss., and erect same in place without expense to the said Union Compress Co.

"The Livermore Foundry & Machine Co. agrees to complete the above mentioned repairs and press ready for service within the period of fifty-five days from the date of the contract.

"For the faithful execution of this contract the Union Compress & Storage Co. agrees to pay the Livermore Foundry & Machine Co. the sum of two thousand and thirty-four dollars on the following terms:

"One thousand dollars to be paid when repairs are delivered aboard cars at Clarksdale, Miss., and the balance, \$1,034, to be paid within thirty days after the completion and satisfactory test of the work.

"It is further agreed that in the event during the progress of the work, or testing of the press, other work, repairs or changes not enumerated in this contract are made, same shall be paid for

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by the Union Compress & Storage Co. at such rates and prices as may be agreed upon.

“The Livermore Foundry & Machine Co. agrees to allow the Union Compress & Storage Co. the sum of six dollars per ton f. o. b. Memphis for scrap iron, and copper at 8 cents per pound.”

Although by this contract the work was to be finished and the various mechanical appliances were to be put in place, ready for the operation of the compress, within fifty-five days from its date, a much longer period elapsed before this was done. In the early part of November, however, they were adjusted, in part at least, and subjected to a test, which was unsatisfactory to Mr. Leach, who was on the ground as a skilled employee representing the plaintiff in error in placing the new machinery and in the experiment made. Finally, after material changes had been made under his direction, he notified the officers of the compress company that he would be ready to make another test on the 11th of November, and asked that he be supplied by the company with a sufficient working crew for this purpose, which was done. In making this test it was discovered that the defect or defects in the head of the hydraulic cylinder constructed by plaintiff in error which were discovered at the first experiment still existed, and that some additional work was required to correct them. This was done, and on the 12th of November a working crew was

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again furnished to Leach, and the machinery of the plant was put in operation in the morning, and with stoppages for short intervals to make some immaterial changes, was continued in operation until about 4 o'clock in the afternoon, up to which time about 400 bales of cotton had been compressed. About that hour an explosion took place, inflicting serious damage on the plant itself and killing one of the employees of the compress company instantly and fatally wounding two others. Upon examination it was disclosed that the head of the low pressure steam cylinder, as well as that of the low pressure hydraulic cylinder, had blown out, and other parts of the machinery had been seriously injured.

Before the accident the compress company had paid \$1,000 on the contract, but this payment was made with the express understanding that the compress company waived no right against the foundry company by reason of any breach of its contract. This action was brought to recover this sum, together with damages sustained by the company, for the injury sustained by the plant from this explosion, and for rental value of the compress during its period of enforced idleness following the accident, upon the theory that the imperfect and unworkmanlike cylinder furnished by the plaintiff in error was the occasion of the accident and loss. The trial of the case resulted in a verdict which is in these words:

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"We, the jury, find for the plaintiff and assess their damage for injury and cost of repairing machinery and premises and replacing same, caused by breach of contract and cylinder explosion, \$3,500; for money paid on contract, \$1,000, with interest; for loss of rental value of compress caused by breach of contract and cylinder explosion, \$3,000; total, \$7,500.

"W. H. MONTGOMERY, *Foreman*."

The first error assigned is that there is no material evidence to support the verdict of the jury. In considering this assignment, the well-settled rule is as announced in *Citizens' Rap. Transit Co. v. Seigrist*, 96 Tenn., 120, that in order to impeach in this Court a verdict approved by the trial Judge, the complaining party must take as true the strongest legitimate view of the testimony against him, and be prepared to show that it affords no support to the verdict. So that if the testimony in a given case, viewed from different points of observation, should suggest two theories, both of which may be naturally deduced from it, one of which, if adopted by the jury, makes reasonable their verdict and the other would leave it without material support, this Court will assume that the one which sustains the verdict was the one adopted by the triers of fact and maintain their finding.

Bearing in mind this rule and its corollary, we

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will now examine briefly the facts as disclosed in the case. But, before doing so, it is proper to give some idea of the location and operation of these cylinders and their connections. They were placed in a horizontal position. The low pressure steam cylinder was in the rear and the hydraulic cylinder manufactured by the plaintiff in error was immediately in front, the two being joined firmly together by bolts. Inside these cylinders was a piston common to both. By the use of a lever connected with proper valves in these cylinders, this piston was moved back and forth. Steam was let in behind the piston, which, as it expanded, pressed it forward, and as this movement progressed its plunger came in contact with a volume of water contained in the hydraulic cylinder, and this was moved up toward its head, being pressed against it with a force equal to from 350 to 500 tons, as might be required, which, through pipes communicating with the compress, began the work of compressing a bale of cotton, which was completed by a still more powerful force furnished by the high pressure steam and hydraulic cylinders. As has already been said, the heads of these two low pressure cylinders, as the result of the explosion, were blown off, and the theory of the plaintiff below was that this resulted from the fact that the defendant had unskillfully cast the cylinder; that its head was of inferior material, and so imperfectly and unskill-

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fully done that it would not stand the strain put upon it in the careful operation of the machinery, and that, much before it had received the full force of the strain it should have borne if properly constructed, the head blew off, and thus relieved from resistance, and under the influence of the propelling steam in its rear the piston moved forward with such energy as to break off the head of the steam cylinder.

The record shows that, after the casting was done, Garside, who was the manager of the Livermore Foundry & Machine Co., found on examination, what he supposed shallow sand holes in the head of the cylinder, which he says did not weaken it, but did give it rather an ugly and unfinished appearance, so he had placed over this head a solid brass plate, covering its entire surface, at an expense to his employer of \$150. To fix this cap or plate over this head, some forty-five holes were bored into the upper rim of the cylinder, and the cap was fitted on with bolts carried into these holes. Mr. Garside says, "When the job was done it looked like a good piece of work, and it was shipped down there." And again he says: "I did not think that the drilling there would weaken it to any extent that would be dangerous; that would be anywise dangerous."

As has been stated, after the cylinder was placed, and the other machinery was adjusted to it, Leach, who was sent to Clarksdale as the rep-

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representative of plaintiff in error to do this work, subjected it to a number of tests. When the first of these was made and pressure was put on this cylinder, according to the testimony of a number of witnesses, jets of water burst out all around the head, where it is claimed the imperfections were. This experiment was altogether unsatisfactory to Leach, so after expending several days of labor in undertaking to remedy the defects, he informed the officers of the defendant in error he was ready for another test. When, during this test, pressure was once more applied it was found that water still ran in jets from holes around or in this head.

While thus operating the machinery in compressing cotton with a crew of the compress company, furnished to him for the purpose and working under his direction, according to Cutrer, a witness, "He would stop every little while and do a little work." After the first test he had said to Campbell that he would make an effort, by the use of countersunk bolts, to stop the leaks, and if this failed his company would have to make a new casting, and during the progress of this second test he said to Cutrer that he was afraid he might not be able to remedy it, and the Livermore Co. would have to cast a new cylinder, "but he would continue his work upon it and see if he could fix it."

The head of the hydraulic cylinder was exam-

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ined by a number of persons, witnesses in the case. Shipway, superintendent of the cotton compresses for many years in Memphis, was one of these persons, and he testified that it was "honey-combed and defective;" that the effect of attaching the brass cap with bolts carried into the holes bored in it was to weaken it still more; that this cap could serve no useful purpose, but must have been put on to cover up blow-holes or to prevent them from showing or leaking water.

Morrison examined this head and found it made of porous, slaggy metal and very imperfectly constructed, and Walsh, a practical machinist and engineer of many years' experience, who also examined the head, pronounced it "not a workman-like piece of work at all," and that the drilling of the holes for the cap diminished the resisting force of the metal; and Martin, a witness for defendant below, on cross-examination admitted that if it leaked as described by other witnesses he would not regard it as a sound piece of work. All these parties agree that never before had they known a brass cap on a cylinder head.

It is evident, without further detail, that there was material testimony which, the jury accepting, warranted them in believing that this hydraulic cylinder, at that place where it was to receive the greatest pressure, was of infirm material, poorly cast, and afterward diminished in strength by the

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effort to cover its defects. But were they authorized to infer that this defective heading was the cause of the explosion?

That the initial explosion was not in the steam cylinder we think the jury were authorized to conclude. The steam cylinder had worked for years satisfactorily, and up to the moment of the accident gave no evidence of weakness. The explosion, so far as the record shows, did not dislodge it from its place, though its head was blown out, while this head, together with the hydraulic cylinder, were driven forward a distance of several feet. Upon examination by the expert witnesses, the metal in the former was pronounced perfect, while that in the latter was found to be imperfect by the witnesses named.

In addition, we think the testimony in the case warrants the contention of the plaintiff below that if the initial break had been in the steam cylinder, its necessary effect would have been to release the piston from the pressure upon it from behind and thus have at once relieved the head of the hydraulic cylinder from the strain upon it; and whatever other damage might have been done to the latter, this would not have blown off. On the other hand, we can well see that the jury might naturally have inferred that the break first occurred in the head of the hydraulic cylinder, which, unable by reason of inferior metal used and imperfect construction, to longer

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resist the strain put upon it, gave way suddenly, and the piston, thus relieved, under the impulse of a steam pressure of from 350 to 400 tons, sprang forward with tremendous violence, dragging after it the head of the steam cylinder and at the same time carrying with it the hydraulic cylinder.

It is true there was a suggestion by the defendant below, based upon the testimony of Leach, that the accident was the result of carelessness on the part of the engineer in operating this machinery, resulting in the head of the piston being driven against the head of the hydraulic cylinder, thus weakening it until disintegration of the metal took place, followed by this explosion; but it is evident this theory, as was the other, as to the initial point of explosion, propounded by the defendant below, was discarded by the jury and they accepted, rather, that of the plaintiff. It was for that tribunal to pass upon these respective theories, and, finding that the one adopted by the jury was reasonably deducible from the evidence, we cannot interfere with the verdict.

Second, it is assigned for error that the trial Judge improperly admitted photographs of the compress and the wrecked machinery, taken after the accident. These photographs were taken by the witness immediately after the accident, and served to give the jury, with the explanation of them by the witness, a more correct idea of the

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condition of the wreck than they would obtain from mere description without their aid. Even if proper objection had been made, which we do not find in this record, yet it could not avail, as we hold they were competent to go to the jury. *Bruce v. Beall*, 99 Tenn., 309; *M. R. & T. R. R. v. Magee*, 49 S. W. R. (Texas), 929.

Third, it was not error on the part of the trial Judge in declining to permit defendant below to ask Campbell, one of the parties for whose use the suit is brought, on cross-examination, what he paid Mrs. Cutrer for her interest in this suit. There was no issue in the case which made this inquiry pertinent. When the husband of Mrs. Cutrer was on the stand, within the freedom of cross-examination, he might have been asked as to this matter, but being a collateral matter, his answer would have concluded the investigation.

Fourth, the trial Judge in his charge said to the jury if they found that the loss of the use of the compress was due to the breach of contract of the defendant to furnish the machinery according to the contract, yet such loss could not be considered or allowed by them unless they also found that the defendant, at the time the contract was made, had notice, either from it or otherwise, that such loss of use would ensue from nonperformance by it of its contract. He then adds:

“But if you find that it was in the contem-

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plation of the parties to the contract, by the terms of the agreement or by direct notice, that in the event of default by the defendant to furnish suitable and proper machinery, the loss of the use of the compress would necessarily ensue; and if you find as a necessary result of the explosion—if you find the explosion due to the negligence of the defendant in furnishing a defective cylinder—that the plaintiff was deprived of the use of the compress, plaintiff would be entitled to recover the rental value of the compress, as shown by the evidence, during the period in which it was so deprived of its use.”

It is insisted that there is error in this last paragraph. Before considering this assignment, it is proper to say, in reply to another objection of plaintiff in error, that the declaration averred a loss of rental use or value of the compress for the season of 1897-8 resulting from the breach of contract on the part of the foundry company, and evidence was adduced tending to show that after the accident it was impracticable to supply the compress with machinery in place of that destroyed so as to enable it to do any work during that season, and also what the compress could have done with good machinery, and its rental value.

In the instruction just quoted the trial Judge was applying in brief term the rule laid down by Alderson, Judge, in the now celebrated case

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of *Hadley v. Baxendale*, 9 Exch., 341, which is in these words:

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract, under these special circumstances, as known and communicated.”

Perhaps no rule of practice has provoked more attention from Courts and text-writers, or been more uniformly adopted, than this. It has been with singular unanimity recognized as resting on the sound principle that a party suffering from a breach of contract on the part of another is entitled to recover full compensation for the loss sustained thereby. It is true he can recover only

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those damages resulting fairly and naturally from the breach, but such as may be supposed to have been within the contemplation of the parties as the probable result of the breach are certainly of that character. Mr. Sutherland, in his work on Damages, Vol. 1, p. 79, says: "There is no relaxation of the rule confining the recovery to damages naturally and proximately resulting from the breach in cases where there are such known special circumstances. Indeed, some strictness exists to confine the recovery to the immediate consequences. The general principle of compensation is that it should be equal to the injury. It is a rule based on that principle that the amount of the benefit which a party to a contract would derive from its performance is the measure of his damages if it be broken. It is a rule of interpretation, too, that the intention of the parties is to be ascertained from the whole contract, considered in connection with the surrounding circumstances known to both parties. If it appear by these surrounding circumstances that the contract was entered into, and known by both parties to be entered into, to enable one of them to serve or accomplish a particular purpose, whether to secure a special gain or to avoid an anticipated loss, the liability of the other for a violation of the contract will be determined, and the amount of damages fixed, with reference to the effect of the breach in hindering or defeating

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that object. The proof of such circumstances makes it manifest that such damages were within the contemplation of the parties. Looking alone at the contract silent as to such circumstances such damages sometimes appear to arise very remotely and collaterally to the undertaking violated. But when the contract is considered in connection with the extrinsic facts, there is established a natural and proximate relation of cause and effect between the breach of the contract and the injury to be compensated."

Mr. Sedgwick, in his work on Damages, Vol. 1, Sec. 149, after an examination of the cases in which *Hadley v. Baxendale* has been reviewed and applied, in summing up the general result, says: "On the whole, it will be found that the general tendency of judicial opinion in the United States, as well as in England, is that no new rule of damages has been introduced; that the plaintiff recovers such damages as are approximate and natural, and that, in ascertaining what are natural consequences, we must take into the account all the circumstances of the case, including all facts bearing on the question which were in the knowledge of both parties, even though these be such as would not necessarily, without such knowledge, enter into it."

It would be a waste of labor and space to review the cases in which this rule has been applied—in some with a liberality which we

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might not feel called upon to sanction, and in others with more narrowness of construction, but in all approved. Among the English cases are *Cary v. Thames Iron Works*, L. R., 3 Q. B. 185; *Elbinger v. Armstrong*, L. R.; 9 Q. B. 475; *Grebert v. Nugent*, L. R., Q. B. Dec., Vol. 15, 85, and *Agins v. Great Western Col. Co.* L. R., 1 Q. B., 1899, p. 419; and by the American Courts in *Howard v. Stillwell Mfg. Co.*, 139 U. S., 199; *Willerbee v. Meyer*, 155 N. Y., 446; *Graves v. Ray Co.*, 69 Mo., 574; *Vanwinkle v. Wilkins*, 8 Ga., 93 (S. C., A. S. R., 299); *William v. Is. City Milling Co.*, 25 Oregon, 573; *Vicksburg & Meridian R. R. Co. v. Ragsdale*, 46 Miss., p. 482. The rule was referred to with approval by this Court in *McDonald v. Unaka Timber Co.*, in 88 Tenn., 38, and was directly applied at the present term in the case of *Railroad v. Cabinet Co.*, 104 Tenn., 568, opinion by Justice Caldwell.

But it is argued that, granting the authority of this rule, yet the present case was not a proper one for its application; that the information given plaintiff in error was not sufficient to put it on notice of the extraordinary damages it might incur from a breach of its contract. No case holds in order to put this rule in operation that the party invoking it must have said to the other party, at the moment of making the contract, he would claim these damages for a breach,

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but it may be conceded "the knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with naturally believes that he accepts the contract with the special condition attached to it." *Column S. M. Co. v. Nettleship*, L. R., 3 C. P., 499. Or, as is said by Mr. Sedgwick, "notice must be more than knowledge on the defendant's part of the special circumstances; it must be of such a nature that the contract was to some extent based upon the special circumstances."

Yet, thus interpreting the rule, we think the testimony warranted the trial Judge in giving it in charge to the jury. On this point it was as follows. Mr. Cutrer, president of the company, said:

"Mr. Leach thoroughly understood that was the purpose in view, to fit the compress and have it ready in time to take up the cotton as it came in. Mr. Leach thoroughly understood, and we discussed together the necessity for having this work done in time to press cotton for the season of 1897, and that if his company took the contract, they were to take it and complete the work in time for the crop of 1897."

Mr. W. S. Campbell was asked: "What information, if any, did you impart to the Livermore Foundry & Machine Co. of the necessity of having the work contracted for completed in time,

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and as to the uses to which the press, when repaired, was to be put?"

A. "Well, I of course impressed the fact upon him that we wanted it completed in time to press cotton that would begin to come in to us, and, in fact, they fully understood the nature of the contract and the necessity for having it in shape by the time the season was open for compressing."

But it is also said the trial Judge was in error in saying to the jury upon the case which this testimony tended to prove, that for its period of enforced idleness plaintiff below could recover the rental value of the premises. There was no error in this. *Schuttle v. Brakelin*, 80 N. Y., 156; *White v. Mosley*, 25 Mass., 356; *Keller v. State*, 66 Md., 61; *Chicago City R. R. v. Harrison*, 81 Ill., 218; *Dixon Woods Co. v. Phillips Glass Co.*, 169 Pa. St., 167.

But it is said that the trial Judge, in the clause of his charge set out above, erroneously left it to the jury to construe the written contract between these parties. An examination of the whole clause, we think, shows this criticism to be highly technical. There was no ambiguity in the written contract or controversy as to its execution or provisions. The issue to which the attention of the jury was then being called was, assuming that the foundry was responsible for the explosion and the enforced idleness of the com-

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press, whether at the time of the making of the contract both parties had in view a prompt execution of the contract in order to have the compress in order for the opening of the cotton season, and the loss which would ensue from a failure in promptness in that regard. The written contract did not embody these matters; they were to be ascertained from extrinsic evidence, and might rest in an agreement oral in character or might depend entirely upon a notice from the compress company to the foundry, necessarily inferable from the circumstances known to both parties. It was to this feature of the case, and not to the written contract, the Circuit Judge was addressing himself.

Other errors are assigned, but as they are unimportant, they are disposed of orally.

All are overruled, and the judgment is affirmed.

OPINION ON PETITION TO REHEAR.

BEARD, J. We have been earnestly asked to reconsider this case upon the suggestion that we have carried the doctrine of *Hadley v. Baxendale* further than is warranted by principle or authority, and in so doing have countenanced an application of it which will prove of grave import to manufacturers in the State.

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Before examining this point it is well to repeat that the case at bar is one where a manufacturer agreed with a compress company to construct and put in proper place a hydraulic cylinder within a fixed period, with full knowledge that it was an essential part of the compress machinery, and that the time for its completion and erection was named with regard to the beginning of a limited season, during which the compress could alone be made profitable, yet who delayed delivery much longer than the time agreed upon, and then furnished one which exploded under proper tests, inflicting such injury to the plant as to put it in a condition of enforced idleness for the entire season. In such a case the question is, What is the owner of the compress entitled to recover against the delinquent manufacturer? That he should recover something is evident. He is without blame, while the party with whom he has contracted, in violation of a legal duty to supply a cylinder of good material and workmanship (*Overton v. Phelan*, 2 Head, 445) is at fault. Under these conditions, it will be conceded the general rule is, the loss must fall on that one whose wrong has brought it about, and the party injured shall recover damages commensurate with the loss sustained.

In the case at bar, the compress was erected by its owner for compressing cotton for shipment to market. It was valueless for any other pur-

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pose, and was only valuable for this for a period running from about the 1st of October to the 1st of June of current years. Lying idle during that time, its profit or rent earning capacity to its owners was destroyed. The record showing that it was disabled from work during this period through the fault of the plaintiff, what damages are the owners entitled to recover?

In cases like the present it is certainly true the weight of authority is that for his indemnity the party disappointed of prompt delivery may recover of the delinquent manufacturer the rental value of his property between the dates when the article contracted for should have been delivered and the date of its actual delivery. This much we understand to be conceded in the petition for rehearing, but the insistence is that the principle authorizing a recovery in such a case should not be applied where the enforced idleness is the result of an unexpected accident from latent defects in the work supplied by the manufacturer, and covers a period of time so indefinite as a "season's business." It is said by counsel for petitioner that in the case first put the time of default is certain, and as the manufacturer can calculate with a degree of certainty what the claim against him will be in case of default, it may very well be said in the want of prompt delivery he contemplated, as the natural result of his failure, a loss to the owner of the rental value of

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his property during the period such failure continues, and his liability for such loss as the natural result of his breach. But it is insisted it is otherwise where a stoppage is put to machinery during a season's business by such an unexpected and unusual occurrence as the explosion of a mechanical contrivance furnished by him. In either case, however, there is a breach of his contract. In one he is bound to deliver on time, and fails to do so for several days or weeks; in the other he undertakes to manufacture and put in place, within a given period, a piece of mechanism of sound material and good workmanship, that will stand the strain necessarily imposed upon it, and instead supplies one constructed of such improper substance and in a manner pronounced by experts to be so unworkmanlike as that it explodes and makes a useless wreck of the plant for a whole season. If liable in the one case, upon what substantial ground can liability be averted in the other? In neither case is he liable for a loss of profits, for fluctuation in business, changes in the price of labor, and unforeseen accidents to machinery make this as a measure of damages too uncertain. It is otherwise, however, as to the loss by the owner of the use of his property during the period of inactivity. The value of this use is the rental value of the property, and this is as well ascertainable for six months as for six weeks, for a season as for a fractional

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part of a season. We can see no reason for discriminating between the two cases. For the shorter period he is held responsible because the loss, being necessarily, under the facts of the case, within the contemplation of the parties, as the natural and proximate result of his act, so for the longer period he is equally liable on the same ground.

It is true that in a claim for unliquidated damages the application of this rule, or, in fact, of any rule, may not always do exact justice to both parties; all the Courts can do is to approach this result as near as possible. In all such cases the rule of right is that the party who has suffered is entitled to be placed as near as possible in the same plight he would have been if the contract had been performed by the other party, this, however, to be accomplished within legal limitations.

In the case of *Abbott v. Galch*, 13 Md., 314 (S. C., 71 Am. Dec., 635), the Court held that the measure of damages for failure to erect a mill at the time stipulated in the contract is its fair rental value during the time the owner is thus kept from its use. In discussing the rule the Court made the following observation: "The inquiry here is, What standard of value for the loss of time shall we apply? We cannot adopt any estimate of profits that Abbott might have realized from working the mill, because these were merely speculative, depending on the quantity of

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flour it might grind, the fluctuation of the market as to prices of flour and grain, and the remote contingencies of his being able to procure wheat, labor, and fuel, as well as the continuance of the mill in necessary order, free from accidents and loss of time from other causes. Considering the uncertainty attending the milling business, the difficulty of defining a safe guide for profits, we are of the opinion that a fair rent is the most reasonable standard of the defendant's loss by reason of plaintiff's failure to complete the mill. This we take to be consistent with well established principles."

This rule is also applied in a finely reasoned opinion delivered by Selden, J., for the Court in *Griffin v. Colver*, 16 N. Y., 489 (S. C., 69 Am. Dec., 718), where, after examining and distinguishing the cases, it was held that speculative profits as a basis for recovery would not be considered, but the measure of damages in a failure to furnish an engine by a stipulated time is the value of the use during the period of delay. .

In *Clifford v. Richardson*, 18 Vt., 620, the defendant put machinery into the plaintiff's mill in an unskillful manner, whereby he lost the use of his mill for a long space of time and was put to great expense in repairing the machinery. It was held that both the loss of the use of the mill and the expense of repairs were to be com-

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pensated for in damages. In this case, though, the Court seemed to allow as competent, evidence of what the mill could have earned. On this last point we are not to be understood as approving its holding; otherwise, it is authority for the general proposition that the mill or compress owner is entitled to be placed, as far as a money recovery can, in the same condition as he would have been if the other party had not breached his contract.

Goodloe v. Pryor, 9 La. Ann., 273, is another authority to the same point. It is true this was a case arising under the civil code of Louisiana, which in many essential features differs from the common law. But in this regard that code adopts the rule for the measure of damages in cases like the present, almost in the words of *Hadley v. Baxendale*. After providing that "any person is responsible for the damages he occasions, not merely by his act, but by his negligence, his imprudence or his want of skill," it then provides that "when the object of the contract is anything but the payment of money," and the party committing the breach is not guilty of fraud or bad faith, "he is liable only for such damages as were contemplated, or may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract." Under a contract to build and put in operation a sugar mill and steam engine on the defendant's place,

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the Court found the plaintiffs were guilty of negligence in the execution of their contract, by making a right-hand instead of a left-hand engine; that the castings had defects which caused their breakage when the mill was put in operation, and that they were guilty of a want of skill in the erection of the sugar mill, resulting in serious loss to the defendant. The Court sums up by saying: "Under the law and evidence, we consider the defendant entitled to recover damages for his loss of crop and extra wages paid in consequence of the delay for alterations and repairs in putting the sugar mill and steam engine in operation, said delay being caused by plaintiffs' fault and their failure to execute their contract."

As a matter of course, the condition precedent to such a recovery is that the manufacturer had notice, at the time he made the contract, of the purpose his machine was to serve and of the circumstances requiring a prompt execution of his contract. When these conditions do exist, then the losses which result from his default are within the contemplation of the parties and cannot be called accidental, but are incidental to and flow naturally from the breach.

This rule of law, together with its application to this case, being established, the only question open is, Is there any material evidence to show the rental value of this compress for the season? We do find such evidence, which, even if so

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slight as is insisted, warranted the inference of value drawn by the jury.

It is also urged that we were in error in our ruling on the action of the trial Judge in declining to let the witness, Campbell, state what he paid Mrs. Cutrer for her interest in the present suit. Mrs. Cutrer was an important witness for the plaintiff below. It is said the purpose of the defendant below in undertaking to elicit information from Campbell as to this transfer from Cutrer and wife in the subject of the litigation was to affect Cutrer's credit as a witness with the jury. We repeat as to this that when Cutrer was cross-examined he might have been asked as to this transfer, but, whatever his answer, it would have concluded the inquiry, because made with regard to a matter collateral to the issue. If, however, independent of the fact of transfer, Cutrer had, under the pressure of cross-examination, denied that he had a strong bias for the plaintiff in the suit, according, at any rate, to some authority (1 Wh. on Ev., Sec. 561) he might then have been contradicted by evidence of his own statements to the contrary or other implicative acts. But we find no warrant for the course adopted in this case and still think the action of the trial Judge in this regard correct.

After a careful reconsideration of all the assignments of error, we are unable to discover any reason for a change in the conclusion originally announced by us, and the petition for rehearing is therefore dismissed.

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STATE v. MISSIO.

(Jackson. June 27, 1900.)

1. JUDICIAL NOTICE. *Of incumbent of District Attorney's office.*

This Court takes judicial notice of the name of the person who fills the office of district attorney. (*Post*, pp. 220.)

2. INDICTMENT. *For fraudulently receiving stolen property, must aver what.*

An indictment for fraudulently receiving stolen property need not aver by whom or from whose possession the property was stolen, but it must aver ownership of the property in some person, and its taking from him *animo furandi*. (*Post*, pp. 222, 223.)

Cases cited: *Swaggerty v. State*, 9 Yer., 338; *Wright v. State*, 5 Yer., 154; *Parham v. State*, 10 Lea, 500; *Brooks v. State*, 5 Bax., 607; *Younkins v. State*, 2 Cold., 219.

3. EVIDENCE. *To support charge of receiving stolen goods.*

Where, in an indictment for receiving stolen goods, the ownership of the stolen property is laid in a corporation, it is essential to prove the existence of the corporation, and that it had a general or special property in the thing stolen. (*Post*, p. 223.)

Case cited: *Brooks v. State*, 5 Bax., 607.

4. SAME. *Of existence of foreign corporation.*

The existence of foreign corporations is not provable by a certified list of same published with the session Acts of the Legislature. That method of proof is applicable alone to domestic corporations, chartered and organized under the general incorporation Act of 1875 and its amendments. (*Post*, pp. 220-222.)

Act construed: Acts 1875, Ch. 142, § 20.

Code construed: § 2033 (S.); § 1697 (M. & V.).

Cases cited: *Brewer v. State*, 7 Lea, 682; *Tillery v. State*, 10 Lea, 35; *Anderson v. Railroad*, 91 Tenn., 47.

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5. SAME. *Same.*

Proof of the existence of a foreign corporation, *e. g.*, a common carrier, in whom ownership of property is laid in an indictment for receiving stolen goods, may be made without production of a copy of its charter by showing that it was engaged under a corporate name in carrying on the business of a common carrier through its agents and employees. Proof of its capacity under its charter to hold property, or of its compliance with the State laws touching foreign corporations, is not required. (*Post*, pp. 223-227.)

Code construed: § 7357 (S.); § 6224 (M. & V.); § 5379 (T. & S.).

Cases cited and distinguished: *Jones v. State*, 5 Sneed, 347; *Owen v. State*, 5 Sneed, 493.

6. CHARGE OF COURT. *Erroneous method of giving requests.*

It is a violation of the imperative requirements of the statute, and reversible error, for the Court, over objection of the defendant in a felony case, to permit the Attorney-general to read before the jury a request for additional instructions, and to orally adopt the proposition therein contained as part of his charge without indorsing his decision thereon or reading the same to the jury. Such requests should not be read before the jury by counsel, but handed to the Court for his action. The Court should indorse his action thereon, and, if the request is given, should read it and his action thereon to the jury without one word of oral comment. (*Post*, pp. 227-231.)

Code construed: §§ 7186, 7187 (S.); § 6052 (M. & V.).

Cases cited: *Newman v. State*, 6 Bax., 164; *Manier v. State*, 6 Bax., 603; *Insurance Co. v. Trustees, etc.*, 91 Tenn., 137.

FROM SHELBY.

Appeal in error from Criminal Court of Shelby County. J. M. STEEN, Sp. J.

State v. Missio.

L. T. M. CANADA and L. LEHMAN for Missio.
Attorney-general PICKLE for State.

WILKES, J. The indictment in this case charges the defendant "with unlawfully, feloniously, and fraudulently receiving, buying, concealing, and aiding in concealing four boxes of tobacco of the value of \$15 per box, the proper goods and chattels of the Southern Railway Co., a corporation chartered by law, which had been before, as he, the defendant, then and there well knew, feloniously and fraudulently taken, stolen, and carried away from the said Southern Railway Co., with the intent feloniously and fraudulently to deprive the true owner thereof."

There was a plea of not guilty and a trial, conviction, and sentence of three years in the State penitentiary, and defendant has appealed.

The bill of exceptions states that Mr. Patterson, whom we will judicially know was the District Attorney-general prosecuting for the State, said during the trial that he desired to offer in evidence, as proof of the corporate character of the Southern Railway Company, the list of corporations published in the Acts of 1897, showing that the Southern Railway Company is a corporation.

The District Attorney-general no doubt referred to the certified list of corporations set out in the Acts of the General Assembly of 1897. At pages 802 to 827 there is published a list of

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foreign corporations which have filed their charters in the State in order to do business therein, and in this list appears the following: "Southern Railway Company, Richmond, Va., June 25, 1894."

There is no certificate as to the correctness of this list. We know of no authority of law for its publication.

The statute (Shannon, § 7357) provides: "On all trials for offenses when the existence of a corporation must be shown, a legally authenticated copy of the charter of such corporation or a book purporting to be the public statute book of the United States, or of the particular State in which the charter is printed, shall be *prima facie* evidence of the existence of such corporation."

This section applies to all corporations, whether foreign or domestic, and there was no attempt to comply with this provision in the present case, and it is insisted that proof of corporate character of a foreign corporation could be made only in this manner.

The Act of 1875, Chap. 142, Sec. 20 (Shannon, § 2033), provides that the Secretary of State shall have published and bound with the Acts of each General Assembly a certified list of all corporations organized under that Act since the last publication, giving the name and date of organization of each corporation, and such publi-

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cation shall be legal evidence of the existence of such corporation.

Construing this Act, it has been held that such publication is *prima facie* evidence of the existence or legal incorporation of such corporation. *Brewer v. The State*, 7 Lea, 682; *Tillery v. The State*, 10 Lea, 35; *Anderson v. The Railroad*, 7 Pickle, 47.

But this statute is by its terms limited to such domestic corporations as are organized under the Act of 1875, and its amendments, and does not apply to foreign corporations, and there is no law which makes a list of foreign corporations made out and published by the Secretary of State in the public volumes of the Acts evidence to prove corporate existence.

The ownership of the property alleged to have been stolen, and afterwards received by the defendant, knowing it to have been stolen, is laid in "The Southern Railway Company, a corporation chartered by law," and it was essential to prove the existence of such corporation and its ownership, general or special, of the property in order to sustain the indictment. *Brooks v. The State*, 5 Bax., 607.

It was held in the case of *Swaggerty v. The State*, 9 Yer., 338, that an indictment for receiving stolen property need not show by whom the property was stolen, nor from whose posses-

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sign it was stolen, nor that the principal thief had been convicted. But neither this nor any other case dispenses with the necessity for proving some ownership of the property and its taking, and the intention of the party who receives it to deprive the true owner thereof knowing it to have been stolen. These are the essential elements of the offense. *Wright v. The State*, 5 Yer., 154; *Parham v. The State*, 10 Lea, 500; *Brooks v. The State*, 5 Bax., 607; *Younkins v. The State*, 2 Cold., 219.

It is not necessary to prove who stole the goods, nor the name of the party from whom taken; but it is necessary to prove the ownership, general or special, of some person, and the fact that they have been stolen from the true owner by some one, and have eventually been received by the defendant, knowing them to have been stolen, and with the intent on the part of the defendant to deprive the true owner thereof, and when the ownership is laid in a certain person it must be so proven.

The defendant moved at the proper time to exclude such evidence as had been offered to prove the incorporation of the Southern Railway Company, because incompetent and not the best evidence, and not such as the law requires, all of which the Court overruled.

The case is treated as though the corporate

character could only be proven in one of the modes above pointed out.

We are of opinion that while it is necessary to prove the ownership, general or special, by some one, of the goods alleged to have been feloniously received, it is not necessary to prove the charter of the railroad company, nor its capacity under its charter and the law to be the owner, general or special, of the property. It is shown in this case that the goods were shipped over the Southern Railway, as a public carrier, from Haines, at Winston, North Carolina, to McClintock & Pea Bros., at Grosbeck, Texas. There can be no question under this record but that the goods were feloniously taken from the custody and temporary ownership of this company while in transit, and that they were in possession and ownership of them as a public carrier at the time they were stolen.

We think this is sufficient evidence of corporate character and ownership, and it would be a rule too strict to require that in this collateral though essential matter of ownership the State must prove the corporate existence and character of the railway company by a copy of its charter, and that its charter was regular, and that it had complied with the law in regard to foreign corporations in order to do business or own property in the State, and such strictness would often defeat the ends of justice. In an indictment for burglary

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it has been held that the name of the corporation, and other matters relating to incorporation, need not be stated in the indictment. *People v. Henry*, 77 Cal., 445; *State v. Shields*, 89 Mo., 259; *Fisher v. State*, 40 N. J. L., 169.

And in *Norton v. The State*, 74 Ind., 337, it was held that the corporate existence would be implied without being specially averred.

And in *Crawford v. The State*, 68 Ga., 822, it is held that such averment is surplusage.

But whether this be the correct rule or not, we think that in a collateral matter, as this is, it is not necessary to set out or prove the corporation by producing its charter, nor that the company has complied with all the laws relating to the creation, organization, and operation of corporations.

We think proof that the company was engaged under a corporate name in carrying on the business of a public carrier through its agents and employees is proof of *de facto* corporate existence, organization, and authority to do business and act as such corporation, and sufficient to sustain a conviction in criminal cases. *United States v. Amedy*, 11 Wheaton, 392; *People v. Frank*, 28 Cal., 507; *People v. Barrie*, 49 Cal., 342; *Smith v. State*, 28 Ind., 321; *State v. Thompson*, 23 Kansas, 338 (S. C., 33 Am. Rep., 165); *People v. Davis*, 21 Wend., 309; *People v. Stearns*, 21 Wend., 409; *Calkins v. The State*, 18 Ohio St.,

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366 (S. C., 98 Am. Dec., 121); *State v. Habib*, 18 R. I., 558.

The present case is, we think, distinguishable from the case of *Jones v. The State*, 5 Sneed, 347, and *Owen v. The State*, 5 Sneed, 493. Those were indictments for passing counterfeit bank notes, and it was held in the latter case that the Court would take judicial notice of the existence and charter of the Bank of Tennessee as a domestic corporation, but in both cases that the existence and charter of a foreign corporation must be proven by an authenticated copy of the charter of the bank or the production of a book purporting to be the public statute book of the State in which the charter was granted. This is in accord with the statute. Shannon, § 7357. In those cases the charge was counterfeiting bank notes. To make the offense an indictable one, it was essential to show that the bank notes had been issued by lawful authority. The power to issue bank notes is not an ordinary power attaching generally to all corporations, but only to such as have charter authority for that purpose, for not even all banks have the right to issue bank notes, but only such banks as are given such authority by their charters, and the notes could only be issued according to the terms and provisions of the charter. It was necessary, therefore, in such cases, to prove the charters in order to

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test the validity of the notes so as to make out the offense of counterfeiting.

But no such reasons or considerations exist in the present case, as the power to own personal property is general in all corporations, and does not depend upon specific charter provisions.

The third assignment of error is as follows:

“The Court erred in permitting the District Attorney to read a special instruction to the jury, and in adopting it as part of the charge, without its ever having been read to the jury by the Court.”

The bill of exceptions on this feature of the case contains this recital:

“After reading the general charge to the jury the Court read the special instructions asked by defendant’s counsel, whereupon the Attorney-general asked the Court to charge, in addition, and as amendatory of the special instruction, the following: ‘On this question the jury may consider the proof admitted by the Court on the question of the existence of the corporation,’” which, after objection by counsel for defendant, at the suggestion of the Court, was reduced to writing, read to the Court by the Attorney-general in the presence of the jury, and was given by the Court and adopted as part of the charge, and handed to the jury as part of the charge of the Court. The Court did not actually read the

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amendment, as prepared by the Attorney-general, to the jury.

The statute (Shannon, § 7186) is in the following words:

“On the trial of all felonies every word of the Judge’s charge shall be reduced to writing before given to the jury, and no part of it whatever shall be delivered orally in any such case, but it shall be delivered wholly in writing.

“Every word of the charge shall be written, and read from the writing, which shall be filed with the papers, and the jury shall take it out with them upon their retirement.”

Section 7187: “If the attorneys on either side desire further instructions given to the jury, they shall write precisely what they desire the Judge to say further. In such case the Judge shall reduce his decision on the proposition or propositions to writing, and also read the same to the jury without one word of oral comment, it being intended to prohibit Judges wholly from making oral statements to juries in any case involving the liberties and lives of the citizens.”

In the case of *Newman v. The State*, 6 Bax., 164, it was held that this statute was imperative, and not directory, and must be observed, and a failure to do so was erroneous.

In the case of *Manier v. The State*, 6 Bax., 603, the same construction was placed on it, and it was held that the trial Judge had no right

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to read from any book in delivering his charge, but his plain duty was to write or have printed every word, and then commit the charge to the jury upon their retirement. The real point in this latter case is that part of the charge being extracts from the Code, could not be or were not taken to the jury room, and it was held that one of the evils intended to be corrected was the disputation among jurors as to what the oral charge was, and their frequent return into Court to be recharged on points not remembered or comprehended by all. Section 4803 lays down the same rule for civil cases, and the same construction was adopted in *Ins. Co. v. Trustees, etc.*, 7 Pickle, 137, and applied to a civil case in all the strictness it is applied in criminal cases.

Now, in this case, the special instruction was reduced to writing, not by the Court, but by the Attorney-general. It was read to the Court in the presence of the jury, and was given by the Court and adopted and handed to the jury as part of the charge, but the Court did not in proper person read it to the jury, nor reduce his decision thereon to writing. It appears from the case of *Manier v. The State*, 6 Bax., 693, that the Judge need not actually write the charge or instructions with his own hand, but may have it printed, and we can see no reason why he may not authorize another to write the instructions under his direction, or adopt the in-

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struction as it is written by counsel, if he see proper to do so.

It is said in *Insurance Co. v. Trustee, etc.*, 7 Pickle, 138, that "the reason of the law was, that all that was said to the jury in regard to the case might appear before the appellate Court just as it occurred in the trial Court."

It is argued that the reason of the law is met in this case inasmuch as the instruction was given to the jury, was adopted as part of the charge, and handed to the jury as such. The statute says (§ 7187), that "the trial Judge shall also read the same to the jury without one word of oral comment, the object being to prohibit Judges wholly from making oral statements to juries in any case involving the lives or liberties of the citizens."

We think it an improper practice for counsel, when making requests for specific instructions from the Court, to read the same in the presence of the jury in any case, and more especially in a criminal case. After they are prepared by counsel, they should be handed to the Judge without reading them aloud in the presence of the jury; and after he has examined the same, and reduced his decision thereon to writing, he shall state to the jury so much of them as he deems correct and proper to give.

If he approve the written request presented as a whole, there is no reason why he may not

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adopt the writing furnished him as his own, and make it a part of his charge by attaching it thereto, but he should himself read it to the jury as finally approved by himself, and make it with his decision in that way his own, and the jury should so understand it.

We think that the course pursued in this case was not a compliance with the statute, which expressly and plainly says he shall read it to the jury without a word of oral comment. We are unable to see how the trial Judge could adopt the reading of another without making an oral statement to that effect.

For failure to comply with this requirement of the statute the judgment of the Court below is reversed, and the cause remanded for a new trial. The State will pay costs of appeal.

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(*Jackson.* June 27, 1900.)

1. HOSPITAL FOR INSANE. *Appointment of trustee to fill vacancy, how made.*

The statutes do not require confirmation by the Senate of an appointment by the Governor to the office of trustee of the Asylum for the Insane, when made to fill a vacancy caused by death, resignation, or otherwise than by expiration of full term. And such appointee acquires, without confirmation of the Senate, complete and perfect title to said office for the entire unexpired term, although it may continue and extend over one or more sessions of the Legislature.

Code construed: §§ 2585, 2586 (S.); §§ 2024, 2025 (M. & V.); §§ 1521, 1522 (T. & S.).

2. STATUTES. *Meaning of, how ascertained.*

To ascertain the intention of the Legislature is the controlling object in the construction of statutes. A statute will be taken literally, unless its language is of doubtful import. If the words of a statute are free from ambiguity and doubt, and express plainly, clearly and distinctly the sense of its framers, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation.

FROM HARDEMAN.

Appeal from Chancery Court of Hardeman
County. A. G. HAWKINS, Ch.

State. *ex rel.*, v. Manson.

C. G. BOND and E. L. BULLOCK for relator.

GEO. B. PETERS, A. T. MCNEAL and C. A. MILLER for defendants.

McALISTER, J. This record presents a contest between claimants to the office of trustee for the Western Hospital for the Insane. The relator, A. J. Coates, who is seeking by mandamus to compel the trustees of said institution to induct him into office, claims title by virtue of an appointment from Gov. R. L. Taylor to fill out the unexpired term of J. W. Wilkes, who died in August, 1897. Defendants resist the right of the relator to be inducted into said office upon the ground, first, that the Senate did not act on relator's appointment, and, second, that on March 3, 1899, Governor McMillin, by and with the advice and consent of the Senate, appointed John H. Bills to said office.

The Code of Tennessee, after creating the office of trustee for the Hospital for the Insane and prescribing their duties, provided as follows (§ 2585, Shannon's Code): "They shall be nominated and by and with the advice and consent of the Senate shall be appointed by the Governor as often as vacancies occur by expiration of the terms of the incumbents."

Sec. 2586. "They shall hold their offices for the term of six years; and if a vacancy occurs in the office by death, resignation or otherwise, it

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shall be filled by the Governor for the unexpired term of such trustee."

The facts are that on the 25th of March, 1897, J. W. Wilkes was appointed by the Governor of the State, with the advice and consent of the Senate, a trustee for the Western Hospital for the Insane for the full term of six years. Wilkes was inducted into said office and continued to discharge the duties until — day of August, 1897, when he died. On the 19th day of October, 1897, thereafter, the relator, A. J. Coates, was appointed by the Governor and commissioned a trustee for said hospital to fill the unexpired term of Wilkes. On the 3d of March, 1899, Governor McMillin, by and with the advice and consent of the Senate, appointed John H. Bills as trustee for said hospital. It was recited in the commission of Bills that the appointment was made on account of a vacancy having occurred by reason of the expiration of the term of A. J. Coates. The appointment of Bills was made for a full term of six years. It should have been stated that the relator, Coates, entered upon the discharge of his duties and continued to fill the office until he was ousted by the appointment of Bills. The question presented for our determination, upon the record is, Whether an appointment made by the Governor to fill a vacancy occasioned by the death of an incumbent is only *ad interim* and until the Senate

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confirms or rejects, or does the appointee fill out the unexpired term?

The contention of the relator is that his nomination and commission by Governor Taylor on October 1, 1897, constituted an appointment for the unexpired term of Wilkes, and that the Governor and Senate were without authority to make the appointment of Bills on March 3, 1899, since the relator's term had not then expired.

The contention of the defendant is, "that the nomination and commission of said Coates, on October 1, 1897, being without the advice and consent of the Senate, entitled him to the position until such time as that body might act in conjunction with the Governor in making an appointment, and that Coates' term expired upon the appointment of Bills, made by the Governor with the advice and consent of the Senate."

The Chancellor held that, upon a proper construction of the statutes, the Governor is empowered to fill a vacancy occasioned by death or resignation by an appointment for the unexpired term, and that such an appointment does not require the confirmation of the Senate.

It cannot be denied that, under the strict literalism of the statute, the appointment of Coates for the balance of Wilkes' term was expressly authorized, but it is insisted all cognate and constituent statutes on this subject are to be construed in *pari materia*, and that when viewed as

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a whole they disclose the legislative intent that an appointment by the Governor to fill a vacancy shall not extend beyond the meeting of the Senate without its concurrence, and that such body has a co-ordinate right with the Governor in filling such places and in supplying vacancies.

It is argued on behalf of the respondent that the Senate is given co-ordinate authority, and that the Governor's power is merely the nominating power, until by approval of the Senate it becomes a power of appointment. The appointing power, it is further said, the complete filling of the office, must be by concurrent action, save only when, from the circumstances of the case, the Senate cannot be consulted and the Governor must act alone. As illustrating the intent of the Legislature, and the consequences that would follow the literal construction of the statute, reference is made to the fact that Wilkes was appointed, by and with the consent of the Senate, in February, 1897, for the full term of six years, and at the date of his death had only served six months, and that Coates, appointed his successor during the recess of the Senate, would fill the office for five years and six months, nearly a full term, without any concurrent action on the part of the Senate.

It may be said, in answer to this suggestion, that, if the law has lodged in the Executive the appointing power to fill vacancies occasioned by

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death or resignation, without the concurrent action of the Senate, it is wholly immaterial that the tenure of such an appointment may extend nearly a full term. So, at last, the solution of the question depends upon a proper understanding and interpretation of the statutes regulating this subject. "One who contends that a section of an Act must not be read literally, must be able to show one of two things—either that there is some other section which cuts down or expands its meaning, or else that the section itself is repugnant to the general purview. The question for the Court is, What did the Legislature really intend to direct? And this intention must be sought in the whole of the Act, taken together, and other acts in *pari materia*." Sutherland on Statutory Construction, Sec. 238, p. 316; *Nath v. Tamplin*, L. R., 8 Q. B. Div., 12, 253.

Says the same author: "The rules of construction with which the books abound apply only when the words are of doubtful import. They are only so many lights to assist the Courts in arriving with more accuracy at the true interpretation of the intention.

"The literal interpretation of a statute, according to Lieber's definition, is finding out the true sense by making the statute its own expositor. If the true sense can thus be discovered, there is no resort to construction. . . . It is beyond question the duty of Courts, in construing statutes,

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to give effect to the intent of the law-making power and seek for that intent in every legitimate way. But first of all, in the words and language employed; and if the words are free from ambiguity and doubt, and express plainly, clearly, and distinctly the sense of the framers of the instrument, there is no occasion to resort to other means of interpretation. It is not allowable to interpret what has no need of interpretation." Sutherland on Statutory Construction, Secs. 236, 237.

It has already been seen that, by the plain and unambiguous language of § 2585, Shannon's Code, that if a vacancy occurs in the office by death, resignation, or otherwise, it shall be filled by the Governor for the unexpired term of said trustee. But it is insisted that this language is limited by the preceding section. It is manifest, however, that section is dealing with original appointments and filling vacancies occasioned by the expiration of the terms of incumbents. There is no antagonism or inconsistency between the two sections, but they relate to wholly distinct subjects. In this connection it is well said by learned counsel for relator, viz.: "Neither in terms nor by implication can anything be found in said Acts conferring upon the Senate the power to act where the vacancy occurs by death. It is equally clear from said sections that the legislative grant of power jointly to the Executive and

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Senate is confined to filling vacancies occurring by reason of the expiration of the term of office. There is nothing in said sections, either in terms or by implication, authorizing the construction that when a vacancy occurs by death the executive appointment shall be limited by the subsequent action of the Senate. On the contrary, the Act, in express terms, provides that the Executive appointments in such cases shall be for the unexpired term. To limit in such cases the executive appointment to a period when the Senate shall act, would destroy the terms of the statute providing that the appointment shall be for the unexpired term, and interpolate a limitation upon the terms of incumbents violative of the words and intent of the Act.

“By the express terms of § 1521 of the Code of Tennessee, the advice and consent of the Senate to the appointment by the Governor of the trustee is limited to a vacancy occurring by the expiration of the term of office of the trustee. By the express terms of § 1522 of said Code, the sole power to fill a vacancy occurring by the death of a trustee is vested in the Governor; such appointment to be for the unexpired term of the deceased incumbent. The two sections of said Code not only fail to confer any power upon the State to act in the last case, but exclude the power of the Senate to take any action.”

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The Constitution of 1870 provides that "the election of all officers, and the filling of all vacancies not otherwise directed or provided by this Constitution, shall be made in such manner as the Legislature shall direct." Art. 7, Sec. 4.

The Constitution of 1834, Art. 7, Sec. 4, contained substantially the same provision. In that instrument the word "vacancies" was followed by the phrase, "that may happen by death, resignation, or removal." This, however, is immaterial. The Legislature admittedly had the power to provide for the appointment of these trustees and the filling of all vacancies that might happen in their offices in such manner as it deemed most judicious. The original Act was passed February 5, 1848, and by the sixth section provided as follows, namely: "The Governor shall nominate, and by and with the advice and consent of the Senate appoint, nine trustees of said institution, two from East Tennessee, two from West Tennessee, and five from Middle Tennessee, of which five three shall be residents in or near Nashville, the other two out of Davidson County. Three of the trustees first appointed shall serve two years, three four years, and three for six years, at the expiration of which period the vacancies shall be filled by appointment for six years, and should a vacancy occur by death, resignation, or otherwise, it shall be filled by executive appointment for the unexpired term of

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such trustee." Nicholson's Supplement, Chap. 205, p. 36.

It would seem very clear from this Act, which is the prototype of the section found in the Code, that the power of filling vacancies in said offices was committed to the executive department, and they were not to be made *ad interim* until the meeting of the Senate, but for the unexpired term. It is very obvious, too, that when the Governor and the Senate are empowered to act concurrently, it is to make an appointment for a full term, and not to fill an unexpired term. The appointment of Bills for a full term of six years was unauthorized, if for no other reason than that the term of his predecessor, Wilkes (leaving Coates out of view), had only partially expired, and herein lies the real test. If the concurrent action of the Governor and Senate is expressly limited to appointments for a full term of six years, what voice can the Senate have in filling an unexpired term? Not by implication, for that matter is expressly committed by the Act to the executive department. There is no room here for the application of artificial rules of construction, since the Acts are perfectly plain and consistent. It is, moreover, perfectly obvious, from a consideration of all the Acts of the Legislature on this subject, that uniformity in the tenure of appointment was intended. An appointment of a trustee

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by the Senate for a full term of six years to fill a vacancy occasioned by death, resignation, or otherwise, destroys at once the uniformity of tenures. The system intended to be established by the Legislature can only be preserved by following the law as written. It is probable that the nomination and appointment of Bills was made under the misapprehension that the term of his predecessor, Coates, had expired. But at the time Coates was appointed only six months of the six years' term of Wilkes had expired, and when, on March 3, 1899, Bills was appointed, Coates had served only sixteen months, and there yet remained four years and two months of Wilkes' term, which could not expire until February, 1903.

We are therefore of opinion that the appointment of Bills was unauthorized and void, and that Coates is entitled to fill out the unexpired term of Wilkes. The Chancellor so held, and we affirm his decree.

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MORROW *v.* APPERSON.

(*Jackson.* June 27, 1900.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

CARROLL, MCKELLAR & BULLINGTON for Morrow.
A. B. PITTMAN for Apperson.

FOWLER *v.* TAYLOR.

(*Jackson.* June 27, 1900.)

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

SMITH & TREZEVANT for Fowler.
J. H. MALONE for Taylor.

PEARSON *v.* COLBERT.

(*Jackson.* June 27, 1900.)

Appeal from Chancery Court of Shelby County.
JOHN L. T. SNEED, Ch.

J. W. CANADA for Pearson.
J. H. MALONE for Colbert.

Tax Title Cases.

ST. BERNARD COAL CO. *v.* BROGAN.

(*Jackson.* June 27, 1900.)

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

JOHN P. HOUSTON for Coal Co.

J. H. MALONE for Brogan.

HENDRICKS *v.* NEWBERN.

(*Jackson.* June 27, 1900.)

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

R. M. HEATH for Hendricks.

PIERSON & EWING for Newbern.

STONE *v.* BEEBE.

(*Jackson.* June 27, 1900.)

Appeal from Chancery Court of Shelby County.
JOHN L. T. SNEED, Ch.

WILKERSON & McGEHEE for Stone.

T. J. BRADEN and J. H. MALONE for Beebe.

Tax Title Cases.

STATE v. DUGAN.

(*Jackson*. June 27, 1900.)

Appeal in error from Circuit Court of Shelby County. L. H. ESTES, J.

JAS. H. MALONE for State.

J. M. GREGORY for Dugan.

1. **TAX TITLES.** *Failure of trustee to file certified list with Circuit Court Clerk, fatal to.*

Failure of the trustee to file with the Circuit Court Clerk the required list, duly certified, of lands struck off to the State Treasurer at tax sales, is fatal to the title of a purchaser of such lands from the Treasurer. (*Post*, pp. 246-251.)

Act construed: Acts 1897, Ch. 1.

2. **SAME.** *Same.*

It is essential that the list shall be duly certified. It is not enough that it is substantially correct. Without certification of the list no title passes to the Treasurer and none to his vendees, and the State acquires by its purchase nothing more than an equity in the property. (*Post*, p. 253.)

Act construed: Acts 1897, Ch. 1.

Cases cited: *Brien v. O'Shaughnessy*, 3 Lea, 726; *Mitchell v. Lipe*, 8 Yer., 179.

3. **SAME.** *Same.*

Failure to certify the list is not cured by that provision of the Act which declares that the Clerk's deed "shall be an assurance of perfect title to the purchaser of said land, and no such conveyance shall be invalidated in any Court, except by

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proof that the land was not liable to sale for taxes, or that the taxes for which the land was sold have been paid before said sale." (*Post*, pp. 251-253.)

Act construed; Acts 1897, Ch. 1, § 71.

BEARD, J. These cases, in one form or another, involve controversies between the original owners of real estate located in Shelby County and adversary parties who are setting up title to the same as purchasers at tax sales made under Chap. 1 of the Acts of 1897.

Many charges going to impeach the title of these latter parties, of a more or less serious nature are made by the original owners; some of these apply only to the title of one of these purchasers, others to two or more, but there is one common to all, which, if held to be good, is fatal, and will render unnecessary consideration of the remainder.

The tracts of land in question were sold by the County Trustee on account of the delinquency of the original owners in the payment of taxes due thereon, and were struck off to the Treasurer of the State for the lack of private bidders. Not having been redeemed within two years, the respective claimants went to the clerk of the Circuit Court and made in each case a payment such as the statute directs and received a conveyance from him. On these conveyances they rest as assurances of perfect title, impeachable, as they insist, by the original owner only

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by bringing himself within the saving provision of the Act, as hereinafter set out.

Before considering the Act itself, it is proper to say that after the County Trustee struck off these lands to the Treasurer of the State he left a list thereof in the office of the clerk of the Circuit Court, but it was not authenticated or certified. And the question common to all these cases is, Can these purchasers from the Circuit Court Clerk, in the absence of a certified list, rest upon their conveyances as assurances of title upon a proper construction of the Act?

The statute is entitled, "An Act to provide more just and equitable laws for the assessment and collection of revenue, and to repeal all laws in conflict with the provisions of this Act." It contains ninety sections and covers a large part of the field for the assessment of property for and the collection of taxes. Only a few of these bear upon the present controversy, and these alone will be examined.

By Sec. 58 it is provided that the County Trustee, on receiving the tax books each year, shall give notice that these books are in his possession, and that he will attend at one or more public places of each civil district for the receipt of taxes. Sec. 59 provides that every taxpayer shall pay his various taxes, save where otherwise directed, on the first Monday of October of each

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year, and Sec. 60 that all taxes remaining unpaid on the first Tuesday of March of each year shall be collected by the County Trustee in the mode therein prescribed. By Sec. 61 it is provided that after the first day of August of each year the Trustee shall advertise for sale all real estate upon which taxes remain due and unpaid, etc., at the door of the Courthouse on the first Monday of September following; and Sec. 62, that on this last-named day he shall proceed to sell all lands delinquent for taxes.

By Sec. 63 it is enacted "that no tract of land shall be sold for less than the amount of the taxes due thereon; and if no person will bid the amount of such taxes, the Trustee shall strike the same off to the Treasurer of the State, to be held in trust for the State, said sale to be for the amount of said taxes, and he shall, on or before the first Monday of October thereafter, file in the office of the clerk of the Circuit Court of his county a certified list of the land so struck off by him to the State Treasurer, specifying the days of the sale, the amount of the respective taxes for which said sale was made, which list shall be made in book form and kept by said clerk as a part of his official records of his office. The list of lands so filed with the said clerk shall be in lieu of conveyances and shall vest title in said Treasurer for the use aforesaid to all the land embraced in

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such list as a conveyance to said Treasurer would do.”

Sec. 66 provides that the (list of) lands struck off to the State shall remain in the office of the clerk of the Circuit Court “for the purpose of redemption by the owners, etc., at any time within two years,” and Sec. 70, that “after the time for redemption of any tract of land sold for taxes shall have expired, any person shall be entitled to receive from the clerk of the Circuit Court a conveyance of the title vested in the Treasurer of the State, for the uses aforesaid, upon the payment to said clerk of the whole amount of taxes for which the land was sold, and all costs, interest, and fifty cents for making the deed, for compensation for the clerk, which conveyance shall vest in him a good and indefeasible title.”

Reverting now to Sec. 63, we think the legislative intent is manifest that the title of the State, or, rather, of the Treasurer of the State, to such lands as fall within its provision depends on two things to be done by the County Trustee, one of which is not more essential than the other:

First, he must make the sale as provided by the statute, striking off the land to the Treasurer of the State, and, second, he must make a certified list of these lands, specifying the days of the sale, the amount of the respective taxes

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for which said sales were made and each item of costs thereof, and file this with the clerk of the Circuit Court. The sale, while absolutely necessary, is only a preliminary step. Of itself it works no transmutation of title. This and nothing more being done, it would hardly be insisted that the State had acquired anything more than an equity in the property. But this would leave untouched the title. To draw this out of the original owner and fix it in the Treasurer of the State, this certified list is required. And to a wise end is this essential. It stands in the place of and operates like a conveyance *inter partes*. It is made, because certified, an official record. It authenticates to the owner that his property has been sold and is subject to redemption, and is the muniment of title to the purchaser when the time of redemption has passed. This list, thus lodged in the office of the clerk, serves to some extent the same purpose as the books in the Register's office.

The legislative intent to make the list a prerequisite is made still further apparent by reference to Sec. 65 of the Act, which requires the Trustee to make out and file a list, similar in every respect to that referred to in Sec. 63, of the delinquent land he sells to individuals; but with respect to this it is provided that the failure to make return of this list, or the filing of a defective list, shall not affect the title.

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No such provision is made with regard to the other list, and it is not a strained inference that in making this distinction between the two classes of cases the Legislature intended to emphasize the rule that the doctrine of *caveat emptor* applied in the one and did not in the other.

It has been seen by Sec. 70, after the time for redemption of any tract of land struck off to the Treasurer of the State has expired, any person making proper payments to the clerk is entitled to receive a conveyance of what? Of the title vested in the Treasurer. But there is no title vested in him, lacking the certified list; and the clerk can only convey where such title is vested. In the want of a proper vestiture, his conveyance is waste paper. It is no more, and affects no better result, than if made by any other unauthorized official. *Thatcher v. Powell*, 6 Wheaton, 118.

But it is said that Sec. 71, which provides such conveyance from the clerk "shall be an assurance of perfect title to the purchaser of said land, and no such conveyance shall be invalidated in any Court, except by proof that the land was not liable to sale for taxes or that the taxes for which the land was sold have been paid before said sale," is a legislative condonation of the failure of the County Trustee to file this certified list. In fact, the argument

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is that it conclusively shuts the door of investigation in the face of the original owner, save in the two particulars mentioned.

This must be unsound. Certainly it could hardly be insisted that such a conveyance would work an estoppel so as to prevent the owner from showing that his land, though delinquent and embraced in a certified list as having been struck off to the Treasurer, was, in fact, never offered or sold by the County Trustee. No more could it be maintained that in a case where land was properly struck off to the State for delinquent taxes, which, subsequent to the sale, were paid by the owner, and yet by error of the Trustee was embraced in the certified list required of him by Sec. 63, and in ignorance of the fact of payment, at the expiration of two years was conveyed under the authority of Sec. 70, that such conveyance would close the mouth of the owner. Yet, if the contention of these tax purchasers is sound, the conveyances from the clerk would bar the owners from showing these facts.

No such force was given to such a deed. It was not the intention of the Legislature by Sec. 71 to make that Act an assurance of title which the officer in question was absolutely lacking in authority to perform. Behind it must be the power to execute before it can have the efficacy now claimed for it. It cannot be, either

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on principle or authority, that the clerk's conveyance itself is the conclusive evidence of its own validity. *Marr v. Hawthorne*, 148 U. S., 172; Cooley on Tax., 521. If the necessary construction of this section was that, on the face of such an instrument, the owner was precluded from showing that the title of his property had never passed out of him, then we could be constrained to hold it violative of constitutional safeguards. But we are not forced to so construe it. It is left scope enough without embracing within it a conveyance which the clerk was without authority to make.

But it is said that the list filed by the Trustee was substantially correct, though not certified, and that the conveyances should be upheld upon the authority of *Brien v. O'Shaughnessy*, 3 Lea, 726. We find no analogy between the two cases. The statutes in question in that case and the present causes were radically different in form and effect.

It is further insisted that the failure of the Trustee to file a certified list ought to work no more injuriously against these tax title purchasers than a failure of the Sheriff to make a proper return does against execution purchasers. *Mitchell v. Lipe*, 8 Yer., 179. But in the one case the return is made absolutely essential to title, in the other it is nonessential.

The judgment of the Circuit Court in *State*

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of Tennessee for Use, etc., v. Dugan is affirmed, and the decrees of the Chancellor in the other cases overruling the demurrers to that part of the respective bills averring that the titles of the various tax purchasers are void because of the failure of the County Trustee to file a certified list of the lands struck off by him to the Treasurer of the State with the Circuit Court clerk are affirmed. No other ground of demurrer is passed on, but all other grounds are reserved.

The causes appealed from the Chancery Court of Shelby County are remanded for answer and further proceedings.

Cicalla v. Miller.

CICALLA v. MILLER.

(Jackson. June 29, 1900.)

1. LEASE. *Lessee's claim for permanent improvements.*

Under a lease, made by an executor under a power, stipulating to continue until the majority of the eldest or the marriage of some one of testator's three children to whom the leased premises were equally and jointly devised, but not to continue thereafter without the consent of the devisee coming of age or getting married, the claim of the lessee for the enhancing value of permanent improvements put upon the premises, made under a clause of the lease providing that he and his representatives should be paid out of testator's estate for permanent and valuable improvements put upon the land by him and remaining at the termination of the lease, to the extent that they enhanced its value, is a personal claim against the general estate which does not attach to the specific lands whose value was enhanced by the improvements, and for which the devisees who did not assent to the lease after majority or marriage, are not personally liable to the lessee or his assignee. (*Post*, pp. 256-267.)

Cases cited: Doty v. Railroad, 103 Tenn., 564; Bream v. Dickerson, 2 Hum., 126; Brooks v. Smith, 1 Shann. Cas., 158; Hite v. Park, 2 Tenn. Ch., 374; Cronin v. Watkins, 1 Tenn. Ch., 120.

2. SAME. *Same.*

And such lease terminates upon the majority or marriage of any one of the devisees, unless it is thereafter continued by the required consent of the parties, and the lessee's right to compensation for improvements attaches at that date. (*Post*, pp. 264, 265.)

3. SAME. *Same.*

The consent required to keep the lease alive after the majority or marriage of a devisee, and to make him a party to it and bind him personally, must be evidenced by some act of a more

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pronounced character than the mere receipt by the devisee of ground rents from the lessee or his assignee. (*Post*, pp. 265-267.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
GEO. GILLHAM, Sp. Ch.

EDGINGTON & EDGINGTON for Cicalla.

R. L. BARTELS, TURLEY & WRIGHT and LEE
THORNTON for Miller.

WILKES, J. This is an ejectment bill to recover a certain premises described in a lease of B. Vaccaro, executor of Paul Cicalla, to Samuel Watson.

There is no contention that the lease has not expired, but a claim is set up for improvements made on the property during the existence of the lease, and a right is asserted to hold the possession of the property until the improvements are paid for.

The Court below was of opinion complainant was entitled to recover the property on and after May 20, 1897, the date she reached twenty-one years of age, and that defendant has no valid claim or lien for improvements made as against complainant, and defendant's cross bill was dis-

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missed and a writ of possession was ordered to issue. The complainant was also decreed to be entitled to the rents of the property from the date mentioned, when she became of age, and a proper account was ordered, and defendant, Miller, appealed and has assigned errors.

The facts necessary to be stated are, that Paul Cicalla made his will, devising all his property to his three children, Aurelia, Parmelia, and Delida, and appointed Bartholomew Vaccaro his executor, with very broad powers. The will is substantially as follows:

"I give, bequeath, and devise unto my three children, Delida Cicalla, Parmelia Cicalla, and Aurelia Cicalla, all my property of every description whatever, real, personal, and mixed, choses in action, bank and gas stock, and every species of property possessed by me of every nature and description whatsoever, to be equally divided between my said three children, share and share alike.

"I hereby name Bartholomew Vaccaro as my executor, having full confidence in his ability and integrity, and request him to accept this trust.

"I hereby, in this my last will and testament, give him full authority to use, control, or dispose of my real estate for the benefit of my three above named children, as in his judgment

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may seem best for the best interests of the estate and of my children.”

Vaccaro, the trustee, made the following lease:

“This indenture of lease, made this the 10th day of January, A.D. 1882, between . B. Vaccaro, trustee of the estate of Paul Cicalla, deceased, of the first part, and Samuel Watson, party of the second part, both of Memphis, Tennessee, witnesseth: That the party of the first part, as trustee under the will of Paul Cicalla, deceased, probated in Shelby County, Tennessee, hereby leases to the said Watson a lot of ground fronting on the south side of Union Street, Memphis, Tennessee, about forty-two feet front, and east of Wellington Street, adjoining the property of said Watson on the west side, running back south about four hundred and four (404) feet to the south boundary line, there being two tenement houses on the lot, numbered 233 and 235.

“Second: The duration of this lease is from the 1st of January, A.D. 1882, until either one of the devisees of Paul Cicalla, the testator, becomes of age or marries, it being provided in the will that the powers of the trustee over the estate shall cease, as to that devisee, on the happening of either event, and this lease is made under and subject to the powers of said will.

“Third: In the event of either devisee arriving

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at age or marrying, and she and her husband consenting, then this lease is to be extended on the same terms until the second, or another, devisee arrives at age or marries, and in case, on the happening of that event, that both devisees and their husbands consent, then this lease is to be continued on the same terms until the last devisee arrives at age or marries.

“Fourth: The consideration of this lease is an annual rent of two hundred and fifteen dollars (\$215), to be paid by the said Watson to the said trustee in quarterly installments, at the end of each quarter, and, in addition, the said Watson is to pay all taxes, State, county, and municipal, and on his failure to comply with his covenants at any time within a reasonable time, this lease may be forfeited by the party of the first part, or his successors, and all claims for improvements shall cease with the forfeiture.

“Fifth: The said Watson covenants to pay the rents and taxes aforesaid as they severally fall due, and to keep the property and all improvements and buildings and fences thereon in repair, and so leave them at the expiration of the lease.

“Sixth: As to all permanent and valuable improvements made and put upon said lot of ground by the said Watson, and standing thereon at the termination of this lease, shall be valued by disinterested parties, one of whom to be

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chosen by the party of the first part, or his successors, one by the party of the second part, or his successors or representing him in estate, and the third chosen by these two, two being necessary to a decision, and to the extent that said improvements enhance the value of the property, the same shall be allowed and paid to the said Watson, or his representatives, by the estate of the said Paul Cicalla.

“Seventh: The alley on the east side of the lot, to the spring, is to be kept open so that the spring can be continued to be used as at present.

“Eighth: This lease is not to be in force until sanctioned by the Chancery Court of Shelby County.

“Ninth: Said B. Vaccaro only acts as trustee under will of Paul Cicalla, and is not to be held liable in an individual capacity by reason of any undertaking growing out of this lease.

“Given under our hands and seals the date above written.

B. VACCARO, *Trustee.*

“SAMUEL WATSON.”

“Witness: H. C. KING, *Draftsman.*”

Complainant, on June 19, 1897, served the following notice on the defendant:

“MEMPHIS, TENN., June 19, 1897.

“Austin Miller, *Esq., City:*

“DEAR SIR—You are hereby notified to vacate

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and turn over to me my property, on the south side of Union Street, in the city of Memphis, near the late residence of Samuel Watson, deceased.

"I came of age on the 20th day of May, 1897, and claim the right to the possession, and to the rents and profits of the property from and after that date.

"Please advise me, also, of the nature and extent of your claim upon the property. Yours truly,
DELIDA CICALLA."

The real questions of controversy arise under the sixth clause of this lease and the facts hereinafter detailed, and, incidentally, the second and third clauses are also involved. Vaccaro filed a bill in the Chancery Court to have the will construed and to obtain directions in the execution of his trust, in 1879. The lease was made pending this suit. This lease was approved by the Chancery Court in January, 1882. Watson thereafter erected improvements on the lot, and afterwards executed a deed of trust on the leasehold and improvements to Myers, as trustee, to secure a debt to Menken. This debt not being paid at maturity, the trust was foreclosed, property sold, and Miller became the purchaser.

In the meantime Aurelia became of age, June 2, 1891, and married Aurelio Piaggio on the 18th of July, 1891, and thereupon these two filed

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a bill against the other two sisters for partition, and on the 28th of March, 1892, the property was divided, and the lot leased to Watson was set apart to Delida. The second daughter, Parmelia, arrived at majority November 25, 1894, and married Lee Baccigalupo, but neither entered into any contract extending the lease, and say in their pleadings that, as a fact, they did not know the terms of the lease, but, according to their testimony, they did know of the lease and its terms, and concluded it was to the best interest of the parties the lease should continue and the property be assigned to Delida, the younger sister. The two older sisters received their share of the ground rents up to the time it was set apart to Delida. In the meantime they attempted to surcharge and falsify the accounts of Vaccaro, as trustee. The result of this litigation is reported in *Vaccaro v. Cicalla et al.*, 5th Pickle, 65, *et sequitur*. All ground rents and taxes were paid up to the time Delida attained her majority. A bill of review was filed by Delida seeking to review and set aside the decrees in the trust case of Vaccaro confirming the lease. This was dismissed by the Chancellor and his decree affirmed by this Court, April term, 1898. Soon after this the present bill was filed, and the only question is, whether complainant must pay for the improvements to the extent they have enhanced the value of the lot.

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Miller filed a demurrer, which was overruled, and a cross bill, which was dismissed. Complainant was given full relief for the possession of the lot, and Miller was denied all relief or compensation for the improvements. No question is made of the power to make this lease, and the whole controversy is as to the rights of the parties thereunder, and turns upon the question whether the provisions in regard to the improvements and pay for the same ran with the land, and whether the provision for compensation for improvements can be enforced by an assignee of the lease against an assignee of the reversion.

It is further insisted that, even if it is not a covenant running with the land, the estate of Paul Cicalla is bound, and that Delida, being the sole party interested in that estate when she terminated the lease, is the representative of the estate, and must be held personally liable for the improvements, and, third, that in any event, having knowledge of the lease and having received benefits and continued the lease with knowledge, she is bound to pay. Attention is called to the use of the word "successors," used in the sixth section, in which a provision is made for fixing the value of the improvements, and it is argued that the term "successor," as applied to the trustee, means the party representing the estate, and not simply a successor as trustee, and that in this sense com-

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plainant is the successor of Vaccaro, the trustee, and to the use of the same term in the fourth section of the lease.

Counsel also insists that much consideration must be given to the intention of the parties, and it was clearly the intention that the covenant should run with the land.

We have recently had occasion to consider very fully the question as to what covenants run with land and what do not, and to review the authorities in our own State and in others upon this question in the case of *Doty v. Railroad*, 103 Tenn., 564. Some distinctions between the cases are there drawn, but we are unable to distinguish the present case from the cases there commented on of *Bream v. Dickerson*, 2 Hum., 126; *Hite v. Park*, 2 Tenn. Ch., 374; *Cronin v. Watkins*, 1 Tenn. Ch., 120; *Brooks v. Smith*, 1 Shannon's Cases, 158.

It appears that it was entirely optional with the lessee, under the terms of the lease, whether he would put the improvements on the lot or not. He was not obligated by it to do so. The buildings were put on the lot after the lease was executed, and were not *in esse* at the time of its execution. This brings the case clearly within the facts and reasoning of the Court in the case of *Bream v. Dickerson*, 2 Hum., 126, and makes the agreement a personal one against the estate of Cicalla as such, and not one run-

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ning with the land, and by its terms expired when the oldest daughter became of age. In order to avail himself of his claim for improvements, the lessee should then have made his demand, and the equities of the parties could have been adjusted between the lessee and the trustee representing the estate. We are satisfied that the lease was not extended beyond the majority of the oldest daughter by any express agreement, and the most that can be said is that it was allowed, after that, to continue so far as the use of the property and payment of rents is concerned. Nor can it be held that any lien was created upon the property, if there was a valid stipulation in the first instance to pay for the improvements. This feature of the case is considered in *Hite v. Parks*, 2 Tenn. Ch., 375.

Nor can it be properly said that the complainant represents the estate of Paul Cicalla in the sense that she is individually bound for personal covenants made by his executor or trustee. These could not, under the will and terms of the lease, bind the estate as such after the first daughter arrived at age and the lease was thereby terminated, and certainly not after a partition of the property and allotment to each of her separate share, in which it appears no notice was taken nor allowance made for compensation for the improvements by complainants in the allotment and valuation of her share. The estate of

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Paul Cicalla as such is not before the Court in this proceeding, nor can complainant be charged with the value of these improvements upon any general ground or idea of equity that, having knowledge of the lease and having received the benefits of its rents, she is bound to pay for the improvements. It must be noticed that she received no rents arising out of these improvements and because of them, but only the ground rents, which, under the lease, the lessee was bound to pay, even if no improvements had ever been made upon the property, and no allowance or valuation was made to her, in allotting her share, out of which to pay for these improvements, as her share was made \$36,680, the same as the other shares. Complainant, after she came into separate possession, simply received ground rents, without regard to the improvements, and did not obligate herself to pay any compensation for these improvements, as between herself and her sisters, so that the question must, in order to do equity and carry out the obvious intention of all parties, be held to have been finally settled when the oldest daughter reached her majority. The words, "successors" and "representatives" of the trustee and lessee, as used in the lease, must be held to refer to successors and representatives who became such before the lease terminated, and we cannot doubt, under the terms of the lease and the facts as we find

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them, that the lease, as such, terminated when the oldest girl became of age, and the rights of the parties were then fixed, and the claim for improvements not having been made at that time, when the entire estate of Cicalla was before the Court and undivided, could not be made afterward, when the property had been divided and no provision made to satisfy the claim for improvements.

We therefore see no error in the decree of the Court below, and it is affirmed, with costs, and the cause remanded for further proceedings.

New Memphis Gaslight Co. Cases.

NEW MEMPHIS GASLIGHT CO. CASES.

(*Jackson*. June 26, 1900.)

1. DEED. *Execution of, by corporation valid, when.*

A deed binds a corporation, though not signed by the corporate name, where it purports on its face to be the deed of the corporation, recites in the *in testimonium* clause that the corporation has caused its corporate seal and the names of its president and secretary to be attached thereto, and which in fact bears the corporate seal, and is signed by its president and secretary in their official capacities. (*Post*, pp. 278, 279.)

Code construed: § 3679 (S.); § 2819 (M. & V.); § 2012 (T. & S.).

2. MORTGAGES AND DEEDS OF TRUST. *Reservation that does not vitiate.*

A mortgage or deed of trust is not vitiated by a stipulation or reservation that nothing therein contained shall prevent the maker, a gaslight company, from "using or expending its money and assets in extending its works, or from selling or exchanging, when deemed expedient for the increase and benefit of its business, its town lots, buildings, manufactories, and machinery, the security of the bonds not to be lessened thereby," where the money and other personal property of the maker is not embraced in the conveyance. "Assets," as here used, embraces only personalty. The power to sell or exchange realty, as here given, is a limited one, and could be made effectual only by consent and conveyance by the trustee and for the purpose of the trust. (*Post*, pp. 279, 280.)

Case cited: *Frierson v. Blanton*, 1 Bax., 272.

3. CONTRACTS. *Manner of construing.*

It is the duty of the Court to construe written contracts, if their meaning be in doubt, so as to give them effect rather than destroy them. (*Post*, p. 280.)

Cases cited: *Morley v. Power*, 10 Lea, 219; *Frierson v. Blanton*, 1 Bax., 272.

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4. CORPORATIONS. *Innocent holder of corporate bonds.*

One who advances money to a corporation upon faith of its bonds deposited as collateral security, is a holder of such bonds for value in due course of trade, and entitled to protection as such. (*Post*, pp. 281, 282.)

5. SAME. *Same.*

One who is compelled as surety to pay the debt of a corporation, and thereafter takes the note of the corporation for the amount secured by deposit of its bonds, is holder of such bonds for value and in due course of trade, and entitled to protection as such. (*Post*, p. 282.)

Case cited: *Atlanta Guano Co. v. Hunt*, 100 Tenn., 89.

6. SAME. *Authority of directors to pledge bonds of, as collateral security for its debts.*

Directors are authorized not only to sell, but likewise to pledge the company's bonds as collateral security for existing indebtedness and future loans, where the bonds were issued under a resolution of the stockholders for the purpose of paying an existing floating indebtedness for improvements and to make others, and to retire an existing bond issue, the directors being authorized by the resolution to use the bonds for these purposes in such manner as they might, in their judgment and discretion, deem best. (*Post*, pp. 282-284.)

Cases cited: *Baxter v. Washburn*, 8 Lea, 15; *Hunt & Bro. v. Gaslight Co.*, 95 Tenn., 136.

7. SAME. *Directors' right to vote.*

Directors of a corporation are not disqualified to vote to apply the bonds or other effects of the company to secure or pay its debts held by another corporation in which they are officers or interested, especially when they are acting pursuant to a resolution of the stockholders. (*Post*, pp. 284, 285.)

8. SAME. *Directors' right to secure themselves.*

Directors of a corporation are not forbidden, by reason of their position, to deal with the company, and where they have become indorsers for the accommodation of the company, they are permitted, while it is a going concern expecting to continue in business, to secure indemnity against possible loss from such indorsements. They may receive collateral security direct from the company, or may retain collaterals held by

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the principal debtor upon their payment of the debt. (*Post*, pp. 285-289.)

9. **SAME.** *Directors' dealings with company scrutinized.*

But the Courts will closely scrutinize all transactions between a corporation and its directors, by which the latter take benefits. (*Post*, p. 289.)

10. **SAME.** *Not treated as insolvent, when.*

A corporation will not be declared insolvent and its property administered as a trust fund for its creditors, and its dispositions thereof set aside, where the bill that prays such relief in the alternative, avers, and the proof shows, that the assets of the corporation are largely in excess of its indebtedness, and that it was, and expected to continue, a going concern at the date of the transactions. (*Post*, pp. 289-292.)

Cases cited: *Marr v. Bank*, 4 Cold., 471; *Moseby v. Williamson*, 5 Heis., 278; *Comfort v. McTeer*, 7 Lea, 660; *Tradesman's Pub. Co. v. Car Wheel Co.*, 95 Tenn., 634; *McLaren v. Roller Mill Co.*, 95 Tenn., 696; *Memphis, etc., Co. v. Ward*, 99 Tenn., 172.

11. **SAME.** *Sale of corporate properties under mortgage not set aside, when.*

A fair, open, public sale of the corporate properties, made under and pursuant to the provisions of a mortgage, will not be set aside at the instance of creditors or stockholders, for the reason that directors of the corporation united with others in the purchase, where it appears that such directors were creditors and holders of bonds of the corporation, but did not procure or invite the sale, which was forced by other bondholders. (*Post*, pp. 292-298.)

12. **SAME.** *Same.*

The sale of the mortgaged property under the provisions of the mortgage and upon the facts set out in the opinion is held not to be premature, though made for the entire indebtedness upon default in payment of interest only. (*Post*, pp. 298-301.)

13. **MECHANICS' LIEN.** *Inferior to mortgage lien, when.*

The mechanics' lien is inferior to that of a mortgage where the materials for which the lien is asserted were furnished after registration of the mortgage and without notice to the mortgagee, though upon a contract made prior to the mortgage. (*Post*, pp. 302, 303.)

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Cases cited: *Baxter v. Washburn*, 8 Lea, 15; *Green v. Williams*, 92 Tenn., 224; *Electric Light Co. v. Gas Co.*, 99 Tenn., 387.

14. CROSS BILL. *Unnecessary, when.*

A cross bill is unnecessary and will be dismissed where the relief which it seeks can be as well obtained under the answer to the original bill. (*Post*, p. 303.)

15. ATTORNEY AT LAW. *Fees of.*

An attorney at law whose services have been rendered in defense of a suit in which no funds of his client have been brought under control of the Court, is not entitled to decree or lien for fees in the cause. (*Post*, pp. 303, 304.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
F. H. HEISKELL, Ch.

T. D. YOUNG, CARROLL, MCKELLAB & BULLINGTON and TURLEY & TURLEY for Rawlins.

B. W. HIRSH, W. W. McDOWELL, T. K. RIDICK, SCRUGGS & ROSEBOROUGH and METCALF & METCALF for Gaslight Co.

BEARD, J. The Memphis Gaslight Company was a corporation organized under the laws of this State for the purpose of manufacturing and furnishing gas to the city and citizens of Memphis.

On the first day of April, 1873, a trust deed

New Memphis Gaslight Co. Cases.

conveying all of its property, rights, and franchises was made by the corporation to S. P. Read, as trustee, to secure the payment of \$240,000 of its bonds, payable to bearer in the city of New York, each bond having attached interest coupons falling due semiannually; these bonds are still outstanding. For many years the company was very successful, paying large dividends to its stockholders, in addition to meeting the interest on its bonds, but in the course of time another gas company was organized in Memphis, and a fierce competition for patronage at once ensued. In order to compete with its rival, equipped with modern economic appliances, as well as to replace with new machinery that which from the wear and tear of years had degenerated, in 1891 and the early part of 1892, the Memphis Gaslight Company found it necessary to expend large sums of money for betterments. In making these a floating debt of about \$135,000 was created, and yet it became apparent to all interested in the company that all needed improvements were not made, and to complete these at least \$25,000 more would be required. This debt already existing taxed the credit of the company, and was a burden upon some of its directors, who had loaned their names to give additional strength to the paper of the corporation issued by it to carry on these improvements. In view of this condition the stockholders convened, according to a call properly made.

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on the thirtieth of June, 1892, when it was by them resolved to issue new coupon bonds of the company to the amount of \$400,000, to run for thirty years, secured by a mortgage on all the property of the company. All the details of the making and the issuance of these bonds to be left to the discretion of its board of directors. At a meeting of the board on the eighth of July, 1892, in pursuance of the authority thus conferred, it was resolved that there should be issued 400 bonds of the denomination of \$1,000 each, to be dated July 1, 1892, payable to bearer, in gold coin of the United States of standard fineness, thirty years after date, bearing interest at six per centum per annum, with coupons for such interest attached payable July 1 and January 1 of each successive year, and to secure these that a trust deed conveying all of the franchises and property of the company should be executed to the Manhattan Savings Bank and Trust Company, of Memphis, as trustee; and that the trust deed should provide for foreclosure upon default in the payment of interest.

At a meeting of the board on the thirtieth of July, 1892, it was resolved that of this issue of bonds only \$160,000 should be immediately used, and a committee was appointed to set forth the needs of the company and to urge upon its stockholders to come to its aid by purchasing these

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bonds; the balance of the issue (\$240,000) was to remain under the control of the company, to be used alone in retiring those secured by the trust deed of 1873.

The effort to sell the \$160,000 of the bonds failed, save to a limited amount, so under the authority of the board of directors those not sold were used as collateral security for the paper of the company, which, as before stated, had been used to raise money for betterments. On some of this paper Napoleon Hill, T. R. Riddick, J. W. Bailey, R. D. Frayser, and N. M. Jones, directors of the company, were accommodation indorsers, and a part was outstanding without indorsers or other security.

The notes indorsed by Hill, Riddick, and Bailey at maturity were taken up by them, and they received from the holder the bonds which had been pledged by the company for their security, or else, each taking a note for the amount of his payment from the company, at the same time received bonds as collateral. In this way Hill, on the payment of \$5,000, received \$6,000 in amount of bonds, and Riddick and Bailey each received \$3,000 par value of bonds for a payment of \$3,000 made by them respectively. These parties, as did others holding the notes of the company thus secured, in pursuance of power given in these notes, upon their maturity and nonpay-

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ment, sold the bonds, and in each case the holder became the purchaser.

Disappointed in various efforts to relieve itself, the company finally defaulted in the payment of the interest on these bonds, and upon a demand made by some of the holders, the trustee named in the second trust deed took possession of all the properties of the company, and, after due advertisement, made public sale of the same. At this sale the holders of these bonds became the purchasers at the sum of \$125,000. Among these purchasers were Hill, Riddick, and Bailey. Soon after their purchase, the parties buying having received a deed from the trustee, organized the New Memphis Gaslight Company, and there was transferred to it all the properties so acquired by them.

These transactions are impeached in the several consolidated suits entitled above. The bill of Mary Rawlings is that of a stockholder of the Memphis Gaslight Company, and has for its object a cancellation of the two deeds of trust executed by that company hereinbefore mentioned, as well as the deed from the trustee, the Manhattan Savings Bank and Trust Company, to the purchasers at the trustee's sale, and the conveyance afterward made by which the property passed to the New Memphis Gaslight Company. Hunt Bros. and Miss Anne Pritchard, executrix, judgment creditors of the Memphis Gaslight Company, filed their

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respective bills in the Chancery Court of Shelby against the same, or many of the same, defendants, as those to the bill of Mary Rawlings, seeking relief against these same conveyances on much the same grounds as are alleged in that bill. The bills of the Laclede Fire Brick Manufacturing Company and of the Christopher Simpson Architectural Iron Works, were filed to enforce mechanics and materialmen's liens for work and labor done and machinery furnished to the Memphis Gaslight Company on contracts made with it before the foreclosure sale already referred to, and, as does the Rawlings bill, they assail the various conveyances and transactions hereinbefore set out, and assert liens in favor of the respective claimants on the property of that company.

The bill of Mary Rawlings was amended so as to make more specific its various charges. In this amendment it is averred that the first mortgage was void because it was not signed by the Memphis Gaslight Company nor sealed with its seal, and, further, because the company had no power, under its charter, to execute the mortgage. It was also averred that the bonds secured by this mortgage were void, because they were used to purchase the property, rights, privileges, and franchises of a competing gas company, and, further, because the bonds were tainted with usury, having been made payable in New York for the

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purpose of avoiding the usury laws of the State of Tennessee.

Again, it was averred "that said second mortgage is void for the reason that (1) said Memphis Gaslight Company had no power, under its charter, to execute same; (2) because said bonds, contrary to law, and contrary to any authority in said officers to execute the same, provide for their payment in gold coin of the United States of the then weight and fineness of the same; (3) because said company undertakes to and does mortgage its right and franchise to exist as a corporation; and (4) because it mortgages or undertakes to mortgage its income."

Continuing, the bill alleges "that said sale under said second mortgage is void (1) because said mortgage and bonds were and are void for reasons hereinabove stated; (2) because the description of said property in said mortgage, and of said indebtedness, is not good in law; (3) because said pretended sale was not properly advertized, and was premature under the terms and provisions of said trust deed; (4) because, further, no proper demand was made on the trustee to foreclose; (5) because said trustee making said sale was the holder of a portion of said bonds for the payment of which said sale was pretendedly made; (6) because said mortgage and bonds were void, having been executed by said Memphis Gaslight Company in the course of its business, when it

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had not paid its privilege taxes; (7) because the pretended debts of the purchasers at the trustee's sale were created at a time, if at all, when these purchasers had not paid their privilege taxes; (8) because the said purchasers were the stockholders, directors, and officers of said company; and (9) because said sale was the result of a combination and of bad faith on the part of the parties interested in acquiring said property at a reduced price, and depriving the holders of the Memphis Gaslight Company of the same; and (10) because fraudulent in fact and in law."

We will dispose of the controversies raised in and common to all these causes, leaving the distinctive features of the several cases for determination at the last.

It is argued that the deed of trust to Read, trustee, is inoperative, because it was not executed by the Memphis Gaslight Company, but was the act and deed of its officers. This instrument upon its face purports to be the deed of the company, but it is signed "Enoch Ensley, President," and countersigned "Geo. W. Gift, Secretary;" it, however, has the seal of the corporation attached. While thus signed, following the conveying terms of the deed the clause *in testimonium* is as follows: "In witness whereof, the said Memphis Gaslight Company has caused its corporate seal to be attached hereto, and caused this deed to be signed by Enoch Ensley, its president, and to be

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countersigned by Geo. W. Gift, its secretary, and it is also signed by S. P. Read, the trustee. This the first day of April, 1873."

This instrument meets the common law requirement, inasmuch as it is authenticated by having affixed to it the corporate seal, and also the requirement of the statute of 1841-42, Sec. 1, carried into the (Shannon's) Code at § 3679, which is in these words: "Instruments in relation to real or personal property, executed by an agent or attorney, may be signed by such agent or attorney for his principal, or by writing the name of the principal by him as agent or attorney, or by simply writing his own name or his principal's name, if the instrument on its face shows the character in which it is intended to be executed."

Again, it is urged this deed of trust is void because of the following clause:

"But it is hereby expressly stipulated and expressed that nothing herein shall operate to prevent the party of the first part from using or expending its money and assets in extending its forks or from selling or exchanging, when deemed expedient for the increase and benefit of its business, its town lots, buildings, manufactories, and machinery, the security of the bonds not to be lessened thereby."

The insistence is that this is, in effect, a reservation of such power of control and disposition of the property conveyed as to render nugatory

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the security of the instrument. The trust deed does not include the money of the gas company, and there is, therefore, no inconsistency in the mortgagor reserving the right to expend it in extending its work. Nor is the instrument any more affected by the addition of the words "and assets," as it is evident the draftsman had in his mind personal assets of a kindred nature with "money;" however, no personal property is embraced in its conveying clause. Thus the only question is, Does the reserved right to the mortgagor of selling or exchanging the property covered by the conveyance when "deemed expedient," vitiate the instrument. We think this question is answered by the case of *Frierson v. Blanton*, 1 Bax., 272. This power to sell or exchange during the running of the mortgage did not involve the power to convey, that was alone in the trustee, and this could only be done by him when the security of the bonds protected by the mortgage was not lessened. So, at the last, the power of control was left with him, and not with the mortgagor. This construction of the instrument is natural, and in giving it we are only recognizing the well-settled rule that it is the duty of the Courts to construe instruments so as to give them operative effect rather than to destroy them. *Morley v. Power*, 10 Lea, 219; *Frierson v. Blanton*, supra. We therefore think there is nothing in this contention.

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As to the averments in the bill that the bonds secured by the Read mortgage were void, because *ultra vires*, in that they were issued to buy up a competing gas plant, and that they were made payable in New York in order to avoid the usury laws of this State, there is no evidence to support either, and they may be dismissed from further consideration.

We come now to a discussion of the trust deed to the Manhattan Trust and Banking Company, and the various steps taken prior and subsequent to its foreclosure, all of which are made subjects of serious attack by the complainants in their several bills.

We do not understand any question is made upon the power of the company to execute this instrument, or as to the formality of its execution; rather the controversy is over the disposition of certain of the bonds secured by it, and the foreclosure sale made under it with the incidents both preceding and subsequent to the sale.

In the first place, it is said that of the bonds secured by this deed only nineteen fell into the hands of *bona fide* holders. This is a mistake of fact and of law. It is true only that number were sold by the corporation, but the remaining \$141,000 of the \$160,000 were used by it to secure loans made to the company at the time of and on the faith of their pledge, or else to secure pre-existing debts either upon renewal or

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otherwise. The Continental National Bank and the Memphis City Bank each advanced money to the company upon the security of these bonds. These banks, no less than the purchasers of the nineteen bonds, were, on this record as to these bonds, holders for value in due course of trade, in the strictest sense. This is also true as to Riddick. He was one of the indorsers of the company's note for \$10,000 made to the First National Bank. Being unwilling to renew the paper, the bank agreed to discharge him, and did do so, on his paying \$3,000 on this note. Thereupon the company executed to him its note for that sum, and pledged three bonds of \$1,000 each as collateral. This made him a *bona fide* holder for value within the ruling of *Atlanta Guano Co. v. Hunt*, 100 Tenn., 89. While it is true the parties taking bonds as collateral security for pre-existing debts, under the rule then prevailing in this State, were not holders for value in due course of trade, yet it being clear that the debts they were given to secure were honest debts of the company, created by it in making the very improvements the bonds were issued to pay for, the creditors receiving them as security were *bona fide* holders, and as such entitled to full protection save as against such equities as might be inherent in the bonds.

But it is said the directors of the company had no power other than to sell these bonds after issuance, and that the act of pledging was there

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fore *ultra vires* and void. This assumption is unwarranted in fact. The stockholders' meeting of June 30, 1892, authorized the issuance of these bonds to the amount of \$400,000, and the execution of a mortgage to secure them, in view of a floating debt of about \$135,000 contracted for extensions and improvements already made, and about \$25,000 of improvements still required, and of the approaching maturity of the \$240,000 bonds covered by the Read mortgage. This meeting, by special resolution, approved the improvements made and contemplated, and also the retiring of the Read bonds, but did not direct the sale of the new bonds for any purpose. On the contrary, it resolved "that when said bonds shall be ready for use . . . they shall be subject to the control of the board of directors of this company, to be used by said board in its discretion and judgment for the purposes in these resolutions specified."

At a meeting of the board on the thirtieth of July following, it was determined that of this issue of new bonds \$240,000 should be placed in the custody of the Manhattan Savings Bank and Trust Company subject to the further order of the board, and that the president of the company should use the remaining \$160,000 of bonds as collateral security for moneys advanced or to be advanced to the company by the First National Bank, or to protect the indorsers of the paper of the company made for such advancements. At

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the same meeting a committee was appointed to effectuate a sale, if possible, of these bonds at par. At the time of the passage of this resolution the only indorsers of the company's paper were four of its directors, to wit, Jones, Riddick, Bailey, and Hill, and it is evident this action contemplated security for them as well as for the holders of the paper. But we think the assumption equally unsound in law. The act of pledging the bonds to secure an advance of moneys for the use of the company, as in cases of the Continental National Bank and Memphis City Bank, or to quiet its pre-existing creditors, or to secure its accommodation indorsers, was not an act *ultra vires*. *Baxter v. Washburn*, 8 Lea, 15; *Hunt & Bro. v. Gaslight Company*, 95 Tenn., 136.

But it is said that the directors were disqualified from voting to apply bonds to secure debts upon which they were liable, or which were held by corporations in which they were interested. At the meeting of the board in July, when the disposition of these bonds was decided, there were present and voting five directors, to wit, Jones, Hill, Frayser, Bailey, and Nathan. Of these Jones was president of the First National Bank, which then held a large amount of the paper of the company, and Nathan was cashier of the Manhattan Savings and Trust Company, which was also a creditor, and all were indorsers of notes given by the company.

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It is to be remembered that the stockholders, at their meeting on the thirtieth of June, 1892, were advised fully of the floating debt of the corporation, and the necessity of adding at least \$25,000 to it, in order to make other improvements, and voted the issue of new bonds primarily to provide for this debt and these further needed improvements, but instead of directing a sale of the excess of these bonds over \$240,000, placed them under the control of the board of directors, to be used by them as in their judgment might seem best. Clothed with this broad power it would require a case at least of more than an exercise of mistaken discretion in their disposition to impeach their action.

In addition we are aware of no principle, and certainly our attention has been called to no authority, which precludes a director of one corporation from voting or otherwise seeking in a legitimate way security for an honest debt due from that corporation to another of which he happens to be an officer.

Again, it is well settled that a director is not forbidden, by reason of his position, from dealing with the corporation, and it often serves a wise purpose that he should lend it his personal credit in carrying on its operations. This being so, why should he not be permitted, from a going concern continuing and expecting to continue business, to

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secure indemnity against possible loss from accommodation indorsements he has made for it?

In *Sanford Fork and Tool Co. v. Howe, Brown & Co.*, 157 U. S., 312, a mortgage was made by a corporation, a going concern, then engaged and in good faith expecting to continue in business, to secure its directors as accommodation indorsers of its paper. In answer to the argument that these parties were directors, and had no right to secure themselves, the Court, speaking through Brewer, J., said:

“For here the corporation, although insolvent within the rule which declares that insolvency exists when the debtor has not property sufficient to pay his debts, was still a going concern, and intended to continue its business, and the mortgage was executed not simply to secure directors and stockholders for past indebtedness, but to induce them to procure a renewal or extension of the paper of the company then maturing, or about to mature, and also to obtain further advances of credit.

“Will it be doubted that if this mortgage had been given directly to the holders of these notes, it would have been valid? Are creditors who are neither directors or stockholders, but strangers to a corporation, disabled from taking security from the corporation by reason of the fact that upon the paper they hold there is also the indorsement of certain of the directors or stockholders? Must,

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as a matter of law, such creditors be content to share equally with other creditors of the corporation because, forsooth, they have also the guarantee of some of the directors or stockholders, whose guarantee may or may not be worth anything?"

It is to be observed in the present case the bonds were not pledged originally to those directors, but to the First National Bank, which had advanced to the corporation large sums of money upon its notes, upon a portion of which they were indorsers. As has been stated, this money, as well as that secured from other sources hereinbefore indicated, was used to pay for improvements conceded by the stockholders to be essential to the proper operation of the company. These parties pledging their individual credit, in order to strengthen that of the corporation, were under no obligation to do so. They derived no benefit from the expenditures and improvements thus made that was not common to all stockholders alike. It is, we think, clear on this record that when they indorsed this paper, as well as when they voted authority to pledge the bonds as security, they honestly believed, and had the right to believe, that they were pursuing a policy likely to accomplish the best results for the company.

It is true that the resolution of the board was that the president of the company should pledge the bonds to secure the payment of its paper or

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to protect the indorsers, and that twelve of the bonds passed ultimately into the hands of those indorsers, to wit, six to Napoleon Hill, and three each to Riddick and Bailey, on account of payments made by them as such indorsers. It, however, is immaterial whether they came by them upon a pledge made direct by the company or from the bank, which, upon receiving payment of the notes they were on, turned over to them its collaterals. They were entitled to them if the transaction from which they came will bear the scrutiny of the Court.

- In *Dunscomb v. Railroad Co.*, reported in 84 N. Y., 190, and upon a second appeal in 88 N. Y., 1, referred to approvingly in *Hunt & Bro. v. New Memphis Gaslight Co.*, supra, it was held a pledge of bonds was valid when ordered by the executive committee of the directory, which committee was composed of three persons, one being the pledgee, and the two others indorsers on some of the paper which the bonds were pledged to secure. Upon this state of facts the Court said:

“The claim that Rucker acquired no title to the bonds for the reason that he obtained them by the votes of two of the directors while they were personally liable as guarantors for a part of the obligation for which security was given, we think cannot be upheld. The debt was due, to Rucker by the company, and the money was not advanced or loaned to Meade and Dunscomb, and

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their guaranty was that of individuals, and not as officers of the company. They were under no personal obligation originally to pay the debt, and no reason is apparent why they were not justified in placing the matter in a position where the company should pay its debt and relieve them." See, also, *Foster v. Belcher's Sugar Refining Co.*, 118 Mo., 238.

It is true all such transactions will invite the closest investigation by the Courts, if brought in question, and must be shown to be characterized by the utmost good faith (3 Thompson on Corp., Sec. 4059; *Addison, etc., v. Lewis*, 75 Va., 701), but when found to be free from all suspicion of unfairness, they will be maintained. There are cases to the contrary, but we think the weight of authority, as well as considerations of policy, sustain such a transaction. *Gould v. Railroad*, 52 Fed. Rep., 685; *Rockford Grocery Co.*, 175 Ill., 89; *Brown v. Grand Rapids Par. Fire Co.*, 58 Fed. Rep.

It is again urged against these pledges of bonds that they were made at a time when the insolvency of the corporation had converted its assets into a trust fund for the payment of all creditors. This objection is made outside the pleadings. In the bills of Pritchett, Christopher & Simpson, and Hunt Bros. the insolvency of the corporation at the time of the pledges is not al-

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luded to. In the bill of the Laclede Brick Company the charge is that at the time of the execution of the second mortgage the property conveyed was worth \$800,000, and that, upon a pretended default in the payment of interest on the bonds secured by that mortgage, through the machinations of their holders, it was foreclosed, and the purchasers were enabled to get property worth at least \$640,000 free from burden, for the sum of \$125,000, thus negating the idea of insolvency. This leaves the Rawlings bill for examination on this point.

It places a still higher valuation on the company's property. In paragraph 23 of the amended bill we find this charge:

"The said property so sold at said sale as aforesaid" (referring to the trustee's sale of April 2, 1894) "was at that time, and is now, worth more than \$1,000,000, and was bid off at a totally inadequate price, and upon this ground, if upon no other, the said sale should be set aside."

In paragraph 56 complainant charges:

"Your oratrix further shows to the Honorable Court that in the fall of 1892 the property account of the Memphis Gaslight Company, made up, approved, and published by said officers, fixed the total value of its taxable property at \$788,256.88, saying nothing of the rights, privileges, and franchises from and in the city of Memphis, a city of more than 75,000 population, worth at least

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\$75,000. Your oratrix further shows to this Honorable Court that after the making of said property account there was \$150,000 expended in improvements, betterments, and extensions of its property, etc., making said property worth at the time it was pretendedly sold for \$125,000 not less than \$1,000,000."

Again, in paragraph 88 of the amended bill is found the following equivocal statements:

"Oratrix further shows to the Honorable Court that if said Memphis Gaslight Company was insolvent at the time said bonds were hypothecated to secure said pre-existing debts . . . of which she is not sufficiently advised to speak one way or the other," etc., and also in paragraph 96 this language: "Oratrix further shows that . . . if it be determined . . . that said company is insolvent, then this bill should be declared a general creditor's bill," etc.

The only approach to an averment of insolvency of the corporation at the time of the pledges is found in the prayer where the Court is asked to declare the hypothecation of the bonds illegal on many grounds, and among others this: "Because said company had no power to preferentially secure said debts, if valid and just, to the exclusion of other creditors or stockholders, at a time when said Memphis Gaslight Company was insolvent."

It will be seen this last statement is a con-

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clusion of law rather than an affirmation of a fact. On such pleadings we think defendants would have been relieved of entering upon proof as to the condition of the corporation at the time of these pledges, save as it might bear on the question of the good faith of its then officers and managers. But such evidence is in the record, and abundantly sustains the contention of defendants that the company was solvent at the time of the issue and pledge of these bonds, and was then and would have continued a going concern but for untoward circumstances over which the directors had no control. This being so, there is no room for the application of the trust fund doctrine announced in *Morrow v. Bank*, 4 Cold., 471; *Moseby v. Williamson*, 5 Heis., 278; *Comfort v. McTeer*, 7 Lea, 660; *Tradesman Pub. Co. v. Car Wheel Co.*, 95 Tenn., 634; *McLaren v. Roller Mill Co.*, *Id.*, 696; *Memphis Barrel, etc., Co. v. Ward*, 99 Tenn., 172.

But it is said the directors, who were on certain of the paper of the company, co-operating with one or two favored stockholders, deliberately brought about the foreclosure of the secured mortgage, when, joining with others, they purchased the valuable property of the corporation for a trifle.

This objection leads to a consideration of the history of the corporation from the time of the determination of the stockholders to issue a new

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series of bonds until, for the default in the payment of interest, the foreclosure sale took place.

As has already been stated, the new bonds were authorized, in part, if possible, to retire an earlier series, and more than all else to provide means to discharge a large floating debt created for betterments already made, and to pay for others that were required. This was in the summer of 1892. At that time a large part of this debt was carried by the First National Bank of Memphis in the shape of notes executed by the gas company. One of these notes for \$10,000 had on it as accommodation indorsers Jones, Riddick, Bailey, and Nathan; one for \$5,000 was indorsed by Napoleon Hill and another for the same amount by R. D. Frayser. The balance of the paper, amounting to about \$50,000, was unindorsed. The entire debt, secured and unsecured, amounted to about \$135,000. It was supposed at the time the bonds were authorized, that there would be no difficulty in selling \$160,000 of the issue. While it is evident the business of the company had been interfered with by the competition of a rival gas company, yet the parties interested believed with the introduction, as had been done, of modern appliances for the making and distribution of gas, the corporation was in a condition to furnish it in a satisfactory manner to its customers, and profitably to itself. We are satisfied at that time there was not in the minds of the directors either

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anticipation of insolvency or of a cessation of business. The committee appointed to dispose of these bonds, however, in 1892, had reported the highest price then obtainable for them was ninety cents. This offer was declined, as they were considered worth par. Afterwards, in 1893, one Underwood, an agent of certain eastern capitalists, appeared at Memphis, and, after a careful examination, made a proposition to purchase both gas companies in that city; this offer was acceptable to the stockholders of the Memphis Gaslight Company residing in Memphis, but was not so to those in Nashville, and therefore came to naught.

In the early part of the spring of 1893 the country began to feel the first shock of the financial panic of that year. This reached its crisis in the summer or fall of 1893. So widespread and disastrous was this that it prostrated business enterprises which until then were regarded as most stable, destroyed or reduced values, and created such general distrust that the very best securities often failed to draw money from its hiding places. It was in the midst of this panic that the First National Bank, holding the notes of the company secured alone by its bonds, called for their payment. Failing in this demand, the bank sold the bonds held by it as collateral under the authority given in their notes, and bought them in at the sale. In addition, in the cases of Hill and Bailey, they were required to take up the notes that they

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were indorsers on, and when they did this the bonds pledged by the company as security were turned over to them. Riddick had already relieved himself by a payment from the note he had indorsed. The company, unable to reimburse these gentlemen, gave to them notes for the sums thus paid, secured by these bonds. Afterwards, by sales properly made, these three parties who had loaned their credit to the company, became the owners of the bonds pledged for their security.

At this time it became evident the company, if not *in extremis*, was rapidly approaching that condition. Several efforts had from time to time been made to avert the final catastrophe. It had before this been determined, if possible, to distribute the burden of carrying the \$165,000 bonds among all the stockholders. This was after an abortive attempt to sell in the open market. The Memphis parties, including those whose good faith is fiercely assailed in these suits, believing the investment safe, but the disposition of the bonds essential, agreed to apportion among themselves \$110,000 of these bonds at par. Large blocks of the Memphis Gaslight Company stock were held in Nashville, and the holders of this stock were urged, but declined, to take the remaining \$50,000. One of the directors, to wit, Mr. Riddick, made a special trip to Nashville, and in personal interviews urged upon those stockholders the propriety and necessity of their taking their due proportion

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of bonds, and thus aiding in tiding the company over to a more prosperous season. In addition, under the order of the board of directors, a circular letter, giving a detailed account of the condition of the corporation had been sent to the stockholders, and each was asked to come to its relief by becoming a purchaser of one or more of these bonds. We are satisfied that all were advised that unless such aid was given that those who had sustained the company up to that time, through the disastrous financial panic of 1893, would give up further endeavor and abandon the property to its fate under the second mortgage. Failing to secure relief, this was accordingly done, and then it was, under a written demand made by certain of the bondholders upon the trustee, it took possession of the property preliminary to a foreclosure of the mortgage. The bondholders making this demand, and the amount of bonds held by each, is set out as follows:

First National Bank	\$ 67,000
Pittsburg Coal Company	21,000
W. H. Brown & Sons	8,000
German Bank of Memphis	9,000
The Continental Bank	18,000
Memphis City Bank	7,000
Total	<hr/> \$130,000

It will thus be seen that neither Nathan, Hill, Riddick, nor Bailey joined in this demand, nor

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are we able to discover that they stimulated it, or in any way confederated with others with a view to bringing it about, in order that they might share in any ultimate benefits resulting from the sale. The record, after a critical examination, fails to disclose on their part any evidence of bad faith, either towards creditors or stockholders, but, on the other hand, does show, as we think, an earnest and persistent effort to save the company from wreckage.

It is true its property was sold by the trustee to the purchasers at the sum of \$125,000, and that Hill, Riddick, and Bailey were three of these purchasers, the holders of the other bonds constituting the remainder. But this sale was a public one, made after due advertisement, without any attempt, so far as we can see, to stifle biddings, and the property was still subject to the Read mortgage for \$240,000. In addition, the sale took place in the early part of 1894, before the country had felt the first movement of financial recovery, and when capital was still unwilling to seek investment.

It is further worthy of note, as going to the good faith of the purchasers, that having transferred the property so acquired to the New Memphis Gaslight Company it operated the plant for almost eighteen months, and then closed it out to the rival company for one hundred and eighty thousand dollars, subject to the Read mortgage.

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The only one of the three directors participating in the purchase at the trustee's sale, and afterwards in the proceeds of this sale, who is a defendant to the Rawlings bill, is Mr. Bailey, and the record shows that in December, 1895, out of the proceeds he received only the sum of \$3,375 for the payment of \$3,000 made by him for the company prior to September, 1893.

Again, it is said there was no default in the payment of the interest on these bonds, and on that account the trustee's sale was unauthorized.

The language in the third section of this Manhattan mortgage, authorizing the trustee to declare the bonds matured in the event of default in the payment of interest, reads thus:

"In case the party of the first part, its successors or assigns, shall fail to pay the installments of the semiannual interest on any of the said bonds, when the same may become due and payable according to the tenor thereof, or any coupon attached thereto, and shall continue in such default for sixty days after such installments have been demanded at the office of the party of the first part, or the National Park Bank, of New York, . . . then and thereupon the principal of all the outstanding bonds hereby intended to be secured shall, at the option of the trustee, become and be immediately due and payable, provided the trustee gives written notice to the party of the first part, its successors or assigns, while such de-

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fault continues, of his option to that effect, which notice the trustee may give of his own motion if he sees fit, and shall be bound to give, if requested, in writing by the holder or holders of \$100,000 in amount of all the bonds outstanding."

The record shows that none of the coupons on these bonds maturing January, 1893, except on ten bonds owned by one Williamson, were paid, and none of the July coupons without exception. Omitting the bonds pledged as collaterals and afterward sold, there were at least nine of the bonds which had been sold by the company for cash, on which there was a default for the January, 1893, coupons, and upon the whole nineteen for the July coupons, and there was no reason why, upon this default, if there had been no other, the trustee should not have exercised his option and declared the whole issue of bonds due and payable.

But that demand was made on the company at its office for the payment of the due coupons largely in excess of these nineteen, is shown by uncontroverted evidence. The default and demand are shown with equal clearness. It is unnecessary to set it out in detail; it is to be found in the testimony of the company's officers, as well as of those who made the demand.

By the clause set out above, the default began with the failure to pay the coupons when mature,

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but the right to declare the whole issue due and payable did not accrue unless this default continued for sixty days after the demand. The testimony is uncontradicted that on October 3, 1893, a number of the holders of these bonds made demand for the payment of their due coupons, and that on December 4, 1893, upon the request, in writing, of the holders of more than \$100,000 in amount of the bonds, the trustee gave written notice to the company that it declared all the bonds secured by the second mortgage due and payable, and thereupon took possession of its property, and after due advertisement made a public sale of it, as hereinbefore is set out.

But it is said that if the trustee had not diverted the income of the plant, while in its possession, to the payment of the coupons maturing on the first or Read mortgage, there would have been no occasion for a sale under the second mortgage. The payment of these coupons was proper; the Read mortgage was prior in point of time, and right, and the trustee, to save possession to itself and its successor in title, was obliged to pay these coupons. It is also insisted that the record, independent of this payment, shows that the trustee received a sufficiency of income while in possession which, if properly appropriated, would have averted the foreclosure sale. We have examined the record on this point, and it must

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suffice for us to say we do not agree with appellants in their contention.

It is also said that the three directors, who had acquired the bonds of the company by reason of their accommodation indorsement of its paper, had no right to purchase at the trustee's sale. On this point there is some conflict of authority, but when it is once determined that a director may lend his credit in good faith to the corporation to enable it to carry on its legitimate business, and take as indemnity to secure himself from personal loss, its bonds, it seems to follow, necessarily, that he acquires the right, as any other mortgagee, to protect himself even to the extent of being a purchaser at a foreclosure sale, which has become inevitable through no fault or design of his. *Twin Lick Oil Co. v. Marburry*, 91 U. S., 587; *Saltmarsh v. Spalding*, 147 Mass., 224. But should it be conceded that we are wrong in this conclusion, yet, it would not avail complainants, because in the absence of evidence of a conspiracy to wrongfully bring about the sale between these directors and their co-purchasers, who sustained no fiduciary relations either to the stockholders or the creditors of the corporation, and who, so far as we can see, acted in good faith, the title acquired at the foreclosure sale could not be avoided. In such case the rule laid down in *Jackson v. Ludling*, 21 Wall., 616, does not apply. The most that complainants could obtain

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would be to hold these directors liable for the profits derived by them from the ultimate sale of the property; but their bills are not framed on this theory, nor do they ask such relief. In addition, Hill and Riddick are not made defendants to the only bill (that of Mrs. Rawlings) under which, even upon proper amendments, such relief was possible.

This disposes of the main contentions raised by the Rawlings bill, but more or less cognate to all the bills. There remains, however, of the consolidated causes the mechanics' lien cases, and the only distinct question presented by them is, Are their liens superior to the rights of the purchasers under the mortgage? The contract of the Laclede Fire Brick Company antedated the mortgage, but no material was delivered until after the registration of the mortgage. The rule is, the title of the purchaser relates back to the time the mortgage became effectual (*Baxter v. Washburn*, supra; 5 Thomp. Corp., Secs. 6257, 6258), while the lien of the materialman begins when his first material is placed on the property, on which the lien is asserted. *Electric Light Co. v. Gas Co.*, 99 Tenn., 387; *Green v. Williams*, 92 Tenn., 224.

The contract of the Christopher Simpson Architectural Works was made and the materials furnished after the registration of the mortgage. In both cases the contract was made with the mort-

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gagor, and no notice of it was given to the mortgagee.

After a careful examination of these voluminous records we are satisfied the Chancellor reached a right conclusion in the dismissal of these bills.

There remains open only one question, and that is made on the appeal of Read, trustee. He was made a party defendant to all these bills, and in each one the deed of trust in which he was named trustee was assailed. He answered the bills denying the averments made against this deed. He also filed a cross bill asking that the trust deed be declared a valid security for the payment of the bonds secured therein. This cross bill was dismissed, and he complains of this as error.

We think the cross bill was properly dismissed. It was not filed as a bill *quia timet*, and there was no occasion for its being so filed. The only parties questioning the integrity of this instrument were the respective complainants filing these bills, and a complete vindication of it could be obtained by their dismissal on answer and proof. A decree on the cross bill would have bound none others than the parties to the suit, and it would be *res adjudicata* as to them on the pleadings as they were. This also disposes of the application of his learned solicitor to have a lien declared for compensation for his professional services rendered the trustee. That the trustee was under legal obligation to protect this trust deed, assailed

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as it was, and that he was authorized to employ a lawyer to this end, we think clear; and that the gentleman so engaged has rendered valuable service to his client is equally clear. But the fixing of the fee, and the security for its payment, must be between the two. There is no fund under the control of the Court upon which it could fix a lien, and no adverse parties against whom a decree in his favor could be rendered. To grant a lien or determine the amount due for the solicitor's service in these cases would be *brutum fulmen*. We have examined, as far as they have been available to us, the authorities relied on for this application, but none in our opinion support it.

The decree of the Chancellor is in all things affirmed. The costs of the lower Court are left as adjudged by him; the costs of the appeal will be paid by the complainants in these several causes and S. P. Read, trustee.

Tom and Robert Smith v. State.

TOM AND ROBT. SMITH v. STATE.

(Jackson. April 16, 1900.)

1. VERDICT. *For murder in second degree supported by the facts.*

The facts set out in the opinion sustain a verdict against defendants for murder in the second degree. (*Post*, pp. 306-315.)

2. HOMICIDE. *Excusable when done to prevent violent felony.*

A homicide is excusable, which is committed by a private person, in a *bona fide* effort to prevent a violent felony, under the belief, honestly entertained, without negligence, that there is no other way to avert such felony. (*Post*, pp. 315, 316.)

3. SAME. *Same.*

And, as a consequence, the slayer of such intervening person, being the party engaged in such unlawful violence, cannot justify the killing upon the ground that the intervenor's acts were such as to imperil the life of the slayer. (*Post*, pp. 316, 317.)

4. SELF-DEFENSE. *Right of, does not exist, when.*

A party who challenges or provokes a fight, and goes into it armed, intending to use his weapons if an emergency requiring it should arise, cannot invoke self-defense in the difficulty that ensues by reason of his fault, until he has desisted and given his adversary notice of that fact. (*Post*, p. 317.)

Case cited: *Irvines v. State*, 104 Tenn., 132.

5. SAME. *Same.*

A brother cannot fight lawfully for a brother who is engaged at the time in the commission of an unlawful and felonious assault. (*Post*, pp. 317, 318.)

FROM WEAKLEY.

Appeal in error from Circuit Court of Weakley County. W. H. SWIGGART, J.

Tom and Robert Smith v. State.

CHAS. M. EWING, R. E. MAIDEN and F. P. HALL for Smiths.

Attorney-general PICKLE for State.

BEARD, J. The plaintiffs in error were convicted of murder in the second degree of Henry Fowler, and their punishment was fixed at twenty years confinement in the State penitentiary. Having failed in their motion for a new trial, they have appealed to this Court.

They are brothers; they were also cousins of the deceased, reared on an adjoining farm to that of his mother. But, while relatives and close neighbors, the evidence shows their respective families had been more or less estranged for several years. Some three weeks before the homicide Tom Smith told several parties that in passing along a road which separated his father's farm from that of the Fowler's, he had discovered the deceased in a compromising position with a young girl, the daughter of one Regan. This story soon became public property, and was not long in reaching the ears of Regan and the deceased. On hearing the report the latter was much disturbed, and sought its author for an interview. What took place at this interview rests alone on the testimony of Tom Smith, the surviving party to it. He stated, while on the witness stand, that in answer to a request on the part of the deceased that he say publicly either that the report in

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circulation was untrue, or else modify it in material parts so as to relieve the parties implicated by it, he said in substance to the deceased: "You know that what I have told is true, but as you say Regan is very angry about it, I am willing to tone it down by saying I may have been mistaken in at least one of its material parts." He further testified that this seemed to satisfy the deceased, and after further conversation, friendly in character, the latter left him in apparent good humor.

This condition however did not long continue. Both parties were evidently dissatisfied, and each indulged in a good deal of angry talk with regard to the original story, and this effort at settlement. At any rate another attempt at an adjustment was deemed necessary. Who took the initiative in this is not clear; it is probable, though, it was the deceased. This resulted in an agreement for a meeting of these two principals and a few of their respective friends at a place near the point from which Tom Smith claimed to have seen the deceased and the young girl, and at an early hour in the morning on the twelfth of June, 1899.

The plaintiff in error, Tom Smith, communicated to his brothers and others of his friends the afternoon before, the time, place, and purpose of this meeting. One of these friends said to him such a meeting was more likely to produce

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than avoid trouble, and suggested instead that he and the deceased select arbitrators to settle the difference between them. To this Smith replied: "I am not afraid of any man, and if Henry Fowler ever comes to my field [referring to their former interview in Smith's field] abusing me, I will give him something to send him out, and it will be a plenty too." To another witness with whom he spoke of the contemplated meeting he said: "When this trouble is settled it will be settled." On the other hand, a number of witnesses testified to conversations which they had with Henry Fowler about the same time. From some of these, according to their testimony, he sought the loan of a pistol. To one he said he would not "tote" (to use his colloquialism) this charge any longer; that Tom Smith had a wife and child, while he had nothing of value to restrain him.

The witnesses who testify as to these conversations with the deceased were all relatives or close friends of the plaintiff in error, Tom Smith; at any rate whatever the deceased was doing and saying was at once communicated to Tom.

On Monday morning, June 12, at an early hour, the deceased, with his brother, Bud Fowler, Regan, and a few other persons, repaired to the place which they understood to be the one appointed for the meeting; waiting for a short time, and Tom Smith and his friends failing to appear, it was suggested that they might, under a

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misapprehension, be then at a point a hundred or two yards distant. Upon this suggestion being made, Henry Fowler said he would go, and if he found this to be a fact, he would ask them to join his party where it then was. To this point the record shows that good temper apparently prevailed in this company, in which the deceased shared. He had given no indication there of a malevolent purpose. He said that morning to at least two of the party, when inviting them to become members of it, that there would be no trouble at the meeting, and he was just out of a friendly wrestling match with one of its members when he started on this mission.

The plaintiffs in error agree that he did go to the point where they, with two or three of their friends, were, and after saluting them, that he said his party were awaiting them below, and he asked that they join them there.

There is no pretense that there was any bravado in either manner or speech on the part of the deceased in extending this invitation. Immediately on receiving it the plaintiff in error, Bob Smith, and one Summers, the brother-in-law of the two Smiths, started down the road in the direction indicated, in company with the deceased, and joined his friends. Tom Smith said to them as they left him he would soon follow. On the way down it is not claimed by Bob Smith and Summers that the deceased evidenced bad blood. On

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the contrary, they say he was, or seemed to be, in a pleasant mood. When they reached the party of the deceased good nature prevailed there. No violence of word or act was committed. The conversation was such as friends gathered for an idle hour might have indulged in. While thus engaged Tom Smith was heard approaching and making a loud out-cry. This cry, which the witnesses interpret as "ahooahoo," it seems was common to that section of the country, and one which he says he (Smith) often uttered when at his work. When he came within easy hailing distance of the party he said: "You fellows come up to the place agreed on." To this Regan replied: "Come here; this is the place agreed on." When Tom Smith said to him: "You are a liar!" Regan replied: "You cannot come down here and tell me I lie." And Tom advancing, said: "I can, and all of you fellows concerned in this are s——s of b——s." Immediately all the party arose to their feet and moved toward Tom. He says as they came he retreated, but we think the weight of the testimony is that he continued his advance. As they approached one another, Bud Fowler picked up a piece of wood and threw it at Tom. They were then about thirty paces apart. The latter says as Bud was in the act of throwing he called out: "Come on, boys, let's kill him!" And he (Tom) replied: "Boys, don't do this. This is not the way to settle." This statement is

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denied by the State's witnesses, and evidently the jury gave no credit to it. While no doubt exasperated that plaintiff in error, Tom, should come to a place of meeting intended for a peaceable settlement with defiant manner and an opprobrious speech, yet the utterance attributed to Bud is hardly reconcilable with his quiet and pleasant manner up to that moment. On the other hand, in view of his turbulent approach and offensive words, and his admission that he was not frightened, but "simply excited," we think the inherent probability, as well as the weight of the affirmative evidence, is against the truth of this statement of Tom Smith.

What then occurred may be given in a summary of the testimony of the witnesses for the State, and of the plaintiffs in error, the statements of the latter being supported by a sister, who says she came on the ground in time to see the whole difficulty.

The witnesses for the State say as Bud Fowler, at a distance of thirty steps from Tom Smith, was in the act of throwing the piece of wood, as has been before stated, the latter pulling his pistol fired at him, but missed his aim; that having thrown the wood, notwithstanding the fire, Bud continued to advance, and as he did so he stooped and broke a sassafras root partly decayed, and for its size light in weight, and hurled this at Tom Smith. One of these pieces of wood hit

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the latter on the elbow. About the time of the cast of the last of these, Tom Smith again fired at Bud, and again missed him. Bud and Tom finally came together. When Bud having seized Tom with one hand the latter fired the third shot, his pistol being so close as to powder-burn his victim's body. This shot brought Bud Fowler to the ground with a mortal wound.

On the other hand the plaintiffs in error both testify (and in this they are corroborated by their sister, Mrs. Glasgow) that Bud Fowler having thrown the two pieces of wood, as has been stated, rushed on Tom and struck him a heavy blow on the wrist with a part of a brick, about one-half of a whole, and then dropped his hand to his pocket as if to draw a pistol, at which instant, Tom, believing himself in imminent danger, fired the fatal shot.

The jury, however, did not credit this testimony, but evidently accepted that of the State's witnesses, and in doing so we think were well warranted. In the first place, we are satisfied Bud Fowler had no brick. He was without his coat at the time of the difficulty, and it would have been impossible for him to have effectually concealed about his person an article as large as this is claimed to have been; nor is there any pretense that there were bricks lying about on the ground at this place of meeting. In the second place, it is not even suggested that Bud

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was armed at that time with either pistol or knife. Then, why should he have released his hold to make this fruitless demonstration towards his pocket when at that moment his adversary held threateningly the muzzle of the loaded pistol in close proximity to his body?

We are satisfied there was no justification for this shooting; that there was nothing in the attitude or conduct of Bud Fowler to raise in the mind of Tom Smith a reasonable apprehension of death or great bodily harm.

This conviction, however, is not for the killing of Bud, but of his brother, Henry Fowler. We will now turn to the facts attending this latter homicide.

The witnesses for the State agree that Henry Fowler was in the party which advanced with Bud Fowler, and that as Tom Smith was shooting at Bud, Henry passed in front of plaintiff in error, Bob Smith, on toward Tom, and as he did so Bob Smith shot him in the back, and Tom having disabled Bud, immediately turned on Henry Fowler and fired into him four times, two of the shots being given after the latter had fallen on the ground. These witnesses also state Henry was unarmed, or, if armed, that they saw no evidence of it.

On the other hand, the plaintiffs in error deny that Bob Smith shot at all, and agree in their testimony that Tom did the shooting, all of his

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four shots aimed at Henry taking effect in different parts of his body. They state while Tom Smith was engaged with Bud, Henry Fowler, drawing his pistol, rapidly advanced on Tom Smith, firing two shots as he so advanced, when the latter, having disposed of Bud, turned his weapon on Henry, and, in order to save his own life, fired at Henry four times in quick succession; that the two shots fired at Henry after he fell were occasioned by the latter's having raised himself to his elbow and firing one more shot at Tom Smith. In this statement these parties are also supported by their sister, Mrs. Glasgow.

The issue raised as to whether the deceased had a pistol was settled against the claim of the plaintiffs in error; but for the disposition of this cause it may be conceded that he did, and that he fired at Tom Smith, as is claimed by the plaintiffs in error and their sister.

That the weight of the testimony is that Bob Smith shot Henry Fowler in the back, under the circumstances insisted on by the State, we are entirely satisfied. It is uncontradicted that Bob went to this meeting with a pistol in his pocket, and a butcher knife concealed about his person, both of which weapons at a subsequent stage of this affray he used upon the body of Regan.

We also think it clear that Tom Smith had in the beginning an unfriendly feeling for Henry Fowler, and the circulation of the story in ques-

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tion by him was but an evidence of it; that the ineffectual effort at adjustment, followed by the appointment of this meeting in the presence of witnesses, had exasperated this feeling until it became, if not before, one of pronounced hostility. We have no doubt in this mood he armed himself with a view to the meeting, and, in full sympathy with him, that his brother Bob also was heavily armed. In addition, the record shows that this affray was hardly on, or at least it was not well over by the killing of Henry Fowler, when suddenly there appeared on the scene two other of the Smith brothers with loaded guns. The facts seemed to indicate preparation for serious trouble by various members of this family. At any rate the conduct of Tom Smith shows, as we think is clear on the record, he was not on a peaceful errand. Not only did he go to this meeting armed, but upon getting near, by an offensive approach and still more offensive epithets he provokes a difficulty, and then, turning his pistol, makes a deadly assault upon Bud Fowler, an unarmed man, when he had no reason to fear a felonious assault from him.

Under these circumstances, Henry Fowler had a right to intervene, and even slay, to save, if possible, the life of Bud Fowler, his brother. This right of intervention is well settled. "Where a felony is attempted upon any one, not only the party assaulted may repel force by force, . . .

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but any other person present may interpose to prevent the mischief, and if death ensue, the party so interposing will be justified." 1 Russell on Crimes, p. 670. In *Handcock v. Baker*, 3 Bos. & Pul., 265, it is said: "It is lawful for a private person to do anything to prevent the perpetration of a felony." Mr. Wharton, in his work on Criminal Law, Vol. 1, Sec. 495, on this point lays down the rule thus: "A *bona fide* belief by the defendant that a violent felony is in process of commission, which can only be averted by the death of the supposed felon, makes the killing excusable homicide, though if such belief be negligently adopted by the defendant, then the killing is manslaughter." To the same effect is 1 Bish. on Criminal Law, Sec. 877, while in Desty on Criminal Law, Secs. 125*d*, 126, 126*a*, the following statement of the rule is found: "A well grounded belief that felony is about to be committed will extenuate homicide committed in prevention, but not in pursuit by a volunteer. . . . A *bona fide* belief that a felony is in process of commission, which can only be arrested by the death of the supposed felon, makes the killing excusable; but the belief must be honestly entertained and without negligence."

Under this well-settled principle, if Henry Fowler, thus intervening, had killed Tom Smith, it would have been a case of excusable homicide. The reverse of this is equally true. The rule

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which would have excused Henry Fowler condemns his slayer. So it is, Tom Smith cannot avail himself of the plea of self-defense, when his own wrongful act had given to Henry Fowler the right of intervention.

In addition, we repeat here what was announced as a rule of law in the case of *Irvine v. State*, 104 Tenn. Where the defendant by his conduct challenges or provokes the fight, and has gone to it armed with the purpose to use his arms upon his adversary, if the emergency occurs, he cannot, after having slain him, say he acted in self-defense. A man may not, under such conditions, provoke a quarrel, and then, taking advantage of it, excuse homicide. ||

In such a case, in order for the right of self-defense to arise, the party whose wrongful aggression has brought on the difficulty must not only desist from it but he must give his adversary notice that he has desisted; until this has been done the original aggressor cannot kill. *Irvine v. State*. supra. On this point there was nothing in the charge of the trial Judge of which plaintiffs in error can properly complain. Nor was there error in the failure of the Court below to say to the jury that if Bob Smith went to the place of meeting with the purpose to fight only in the defense of his brother Tom, then he would not be guilty of any offense. For Bob cannot excuse himself as a guilty participant in the affray,

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if his brother Tom brought it on with a view to, or was at the moment engaged in, a felonious assault on Henry Fowler. In such event, as has already been seen, Tom Smith could not justify himself for slaying his adversary, and no more could Bob Smith excuse himself for his unwarranted interference. Under such circumstances, he would be an aider and abettor, and responsible with his brother for the unlawful killing.

Many other errors were assigned at the bar upon the brief of the counsel of the plaintiffs, all of which were disposed of orally.

We are satisfied with the conduct of the trial, and that upon the law as given to the jury, and the evidence adduced, the verdict of guilty of murder in the second degree was one of which these plaintiffs in error have no right to complain.

McElya v. Hill.

McELYA v. HILL.

(Jackson. April 12, 1900.)

1. CHANCERY PLEADING AND PRACTICE. *Jury trial.*

Issues upon which, under a proper practice, jury trial may be demanded and obtained in the Chancery Court are such as go severally to the decision, upon its merits, of the whole case. Issues that go to incidental or collateral questions, or involve mere matters of evidence, should not be submitted to jury trial as distinct propositions. (*Post*, pp. 323-325.)

Code construed: § 6285 (S.); § 5218 (M. & V.); § 4468 (T. & S.).

Case cited: Connor v. Frierson, 98 Tenn., 183.

2. SAME. *Same. Example.*

For example, it is proper and sufficient to submit the single issue, "was there or not fraud in the sale," where a vendee demands jury trial, under a bill seeking rescission of his purchase of land for the vendor's fraud; and it is not error for the Chancellor to strike out, as immaterial and confusing, additional issues whose determination would not be decisive of the whole case. (*Post*, pp. 325-327.)

Code construed: § 6285 (S.).

3. SAME. *Same.*

It is not objectionable that an issue upon which jury trial is demanded in a chancery cause involves a mixed question of law and fact. Such issues are triable by jury. (*Post*, pp. 325-327.)

Code construed: § 6285 (S.); § 5218 (M. & V.); § 4468 (T. & S.)

Cases cited: Memphis, etc., Gas Co. v. Williamson, 9 Heis., 340; Whirley v. Whiteman, 1 Head, 617.

4. SAME. *Same.*

The verdict of a jury in the Chancery Court has the same force and effect as a verdict in a law Court, and will not be set aside if there is any material evidence to support it. (*Post*, p. 332.)

Code construed: § 6286 (S.); § 5219 (M. & V.); § 4469 (T. & S.).

Case cited: Scruggs v. Heiskell, 95 Tenn., 455.

5. RESCISSION. *For fraud.*

Extravagant representations or expressions of opinion by the

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vendor in effecting sale of property—*e. g.*, a boarding house—as to the value of the property, and as to the vendee's ability to fill it with boarders, and as to the profits to be realized therefrom, do not constitute fraud that justifies rescission. (*Post*, pp. 327, 328.)

Case cited: *Maney v. Porter*, 3 Hum., 347.

6. SAME. *Same.*

The fact that property was sold at a grossly exorbitant price is a circumstance that may be looked to in support of the vendee's claim for rescission on account of the vendor's fraud. (*Post*, pp. 327, 328.)

7. SAME. *For defective title.*

The vendee is not entitled to rescission on account of defective title or the existence of incumbrances thereon, in the absence of fraudulent concealment of the facts, when the vendor is able to make or tender a perfect title, free from incumbrances, at or before the date of final decree. (*Post*, pp. 329–332.)

Cases cited: *Baker v. Shy*, 9 Heis., 89; *Topp v. White*, 12 Heis., 175.

8. SAME. *Same.*

The vendee's remedy for defective or incumbered title, in the absence of fraudulent concealment of the facts, or the insolvency of the vendor, is not rescission, but an action upon the covenants of his deed where the contract is an executed one. (*Post*, pp. 329–332.)

Case cited: *Land Co. v. Hill*, 87 Tenn., 598.

9. CHARGE OF COURT. *Stating the issues.*

It is not improper or erroneous for the Court, in his charge to the jury, to refer to and set out the contentions of the respective parties and to say that the verdict should be in favor of that party whose contention is sustained, in the opinion of the jury, by a preponderance of the evidence. (*Post*, p. 328.)

 FROM CARROLL.

Appeal from Chancery Court of Carroll County.
A. G. HAWKINS, Ch.

McElya v. Hill.

J. M. TROUTT and J. T. PEELER for McElya.

JO. R. HAWKINS for Hill.

McALISTER, J. This bill was filed for the rescission of a sale of land.

On the 8th of July, 1896, Jno. C. Hill and wife executed a deed to the complainant, Mrs. M. C. McElya, for a house and lot in Huntingdon at the price of \$1,500. Complainant paid \$800 in cash, and for the balance of purchase money executed two notes, each for the sum of \$350, payable in one and two years respectively. The first note was credited by the sum of \$130, the value of a horse and wagon which defendants accepted in part payment of the note. Shortly after the purchase complainant went into possession of the property.

On the 27th of October, 1897, after the maturity of the first note and fifteen months after the purchase, complainant filed this bill seeking a rescission upon the ground of fraud in the sale. She charged that defendants were occupying the property as a boarding house; that complainant had purchased the property in order to enter upon the same business, and that it was a condition of the contract of purchase that defendants should not carry on the same business in the town of Huntingdon; that they would assist complainant in securing boarders and lend her their influence. The bill alleged that defendants, in

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violation of this stipulation of the contract, had immediately opened another boarding house. It was also alleged that defendants contracted to furnish the rooms on the second floor, which they had failed to do. Another allegation was that defendants had grossly misled and deceived complainant in respect of the value of the property. Complainant further charged that when the deed to the property was delivered to her she objected to it because it did not contain all the stipulations of the contract, but she was assured by the defendant that his word was as good as his bond and that he would faithfully comply with his agreement. Complainant charged that defendant had breached the contract and had practiced a great fraud upon her.

Defendants answered the bill, denying all the allegations of fraud and averring a full compliance with the contract, denying any agreement to abandon the boarding house business, and averring that the property was fully worth the price agreed to be paid.

Defendants on same day filed an original bill against complainant and the surety on the notes for the collection of the balance of the purchase money and the enforcement of vendor's lien. The two causes were consolidated and heard together.

A jury was demanded by complainant's solicitor, who formulated twenty issues to be submitted for their determination. The record recites "the Court

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was pleased to disallow all of the issues submitted on behalf of Mrs. McElya, and of his own motion formed three issues to be submitted to the jury on the trial of this cause."

Complainant's solicitor excepted to the action of the Court in disallowing nineteen of the issues submitted by him, and further he excepted to the last two issues formulated by the Court. There was no exception to the first issue formulated by the Court, which was, viz.:

"Was the sale and conveyance of the land set out in the pleadings in these causes by Jno. C. Hill and wife to M. C. McElya fraudulent?"

This was the only issue submitted to the jury, and under the charge of the Court a verdict was rendered that the sale was not fraudulent. On this verdict the Court pronounced a decree in favor of the defendants and rendered judgment for balance of the purchase money.

Mrs. McElya appealed and has assigned errors.

The first assignment is that the Court erred in not submitting to the jury the nineteen issues of fact presented by complainant's solicitor.

It has been held that an issue should not be directed on a question the decision of which is immaterial or unessential to the determination of the suit. Where the issues are very numerous or very minute, or so grouped that confusion and mistake by a jury may be expected, the Court should decide them itself and not send them to a

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jury. Encyclopedia Pleading and Practice, Vol. 11, p. 632. Thus it is held in Massachusetts that, even if a party has a statutory right to trial by jury in an equity case, it is only in regard to those controverted facts which are essential to the decision of the whole case. And whether the facts are so essential or material is to be determined by the Court. *Charles River Bridge v. Warren Bridge*, 7 Pickering (Mass.), 344. So in Delaware it was held that the Act which directs issues of fact in a chancery case to be tried by a jury must be understood as referring only to issues of fact which involve the merits of the case and are material to the decision of the cause, and the Chancellor is not bound to order issues to be tried by a jury unless they are thus material. *Waters v. Comly*, 3 Harr. (Del.), 127; *Connor v. Frierson*, 14 Pickle, 183.

We have carefully examined the nineteen issues tendered by complainant's solicitor, and find that many of them were wholly immaterial and that none of them went to the whole case. The gravamen of complainant's suit for rescission was fraud, which question was to be determined upon a consideration of all the facts and circumstances in the case. Complainant's counsel sought to make every fact tending to show fraud the basis of a separate issue, thus indefinitely multiplying the issues to the dismay and confusion of the jury,

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when the whole evidence could be considered under the issue, Was there or not fraud in the sale?

The second assignment is that the Chancellor erred in submitting to the jury, on his own motion, an insufficient issue which raised a mixed question of law and fact.

Section 6285, Shannon's Code, provides, viz.: "The issues shall be made up by the parties under the direction of the Court and set forth briefly and clearly the true questions of fact to be tried."

It is true that when the Chancellor declined to submit the multitude of issues tendered by complainant's solicitor, he then proceeded to formulate three issues which he thought went to the whole case. Complainant's solicitor objected to the last two, but did not object to the first issue. Thereupon the Chancellor withdrew the last two and submitted only the first issue, which was, viz.: "Was the sale and conveyances of lands set out in the pleadings in this cause by Jno. C. Hill and wife to Mrs. M. C. McElya fraudulent?"

It is objected now, for the first time in this Court, that this issue raises a compound question of law and fact which was improper for the consideration of the jury. Such mixed questions of law and fact frequently arise and are constantly passed on by juries. Questions of negligence and of probable cause in actions for malicious prosecution are mixed questions of law and fact, yet they are

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passed on by juries almost daily in our Circuit Courts. In *Memphis Gayoso Gas Co. v. J. M. Williamson*, 9 Heis., 340, Chief Justice Nicholson said, viz.: "Whenever an action of this kind is commenced and a plea of not guilty is interposed, the jury are to try the question of probable cause, and it is a question then compounded of law and fact. The jury are to decide it as any other question under the direction of the Court as to the law. They judge of the facts for themselves and receive the law from the Court." In the case of *Whirley v. Whiteman*, 1 Head, 617, which involved a question of negligence, Judge McKinney, in referring to the mode of trying cases consisting of both law and fact, says, viz.: "The truth of the facts and circumstances offered in evidence in support of the allegations on the record must be determined by the jury, but it is for the Court to decide whether or not these facts and circumstances, if found by the jury to be true, are sufficient in point of law to maintain the allegations in the pleadings. And this must be done in one or two modes—either the Court must inform the jury hypothetically whether or not the facts which the evidence tends to prove will, if established in the opinion of the jury, satisfy the allegations, or the jury must find the facts specially, and then the Court will apply the law."

In the present case the Chancellor adopted the former method, and in his charge to the jury

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submitted hypothetical statements of the facts which the evidence tended to prove and the law applicable to such facts, but left the settlement of the facts exclusively to the jury. This is the usual practice, which, as seen, is sanctioned by the authorities.

The fourth assignment of error is that the Court erred in the following instruction to the jury, viz.: "In this connection you are instructed that representations, if they are shown to have been made, as to the value of the property out of which this controversy has grown, as to the profits of keeping boarders, and as to whether Mrs. McElya could fill her house with boarders, or expressions of opinion as to the same, although the same may have been extravagant, will not amount to a fraud." *Maney v. Porter*, 3 Hum., 347. It is insisted this was an error, for the reason that the value of the property was one of the main issues; that Hill represented it to be worth \$1,500, when it was worth only about \$800 or \$900. The Court immediately followed the above instruction with this statement of the law, viz.: "It is material in this case that you shall consider the question as to the value of the property sold and purchased at the time of the sale with a view of determining the truth as to the issue submitted. If it should appear that the property in question was sold to Mrs. McElya at a grossly exorbitant price, that is greatly in ex-

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cess of its real value, then this is a circumstance to which you will look with a view of determining the question whether the sale was fraudulent or not; but in order that the price to be paid can be so considered, it must appear that the amount was grossly exorbitant." This is a correct proposition, and it fully meets the objections now urged to the instruction which is made the basis of this assignment of error.

The sixth assignment of error is that the Chancellor erred in the following instruction, viz.: "If you find the fact to be as insisted upon by counsel for Mrs. McElya, as heretofore in these instructions explained to you, you should find the issue in the affirmative; that is, the sale and conveyance was fraudulent. If, however, you shall find the facts to be as insisted upon by defendant's solicitor, as heretofore explained in these instructions, you will find the issue in the negative."

It is said this was error for the reason that the insinstances of the respective counsel were not evidence. If this had been said by the Court, we agree with counsel that it would have been erroneous.. But it will be observed that when the Court speaks of the contentions of counsel it is coupled with the words, "as herctofore in these instructions explained to you." The Court clearly had reference here to his hypothetical statements of the contentions of both sides.

The seventh assignment of error is that the

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Court declined to let the issue of solvency or insolvency of defendant, Hill, at the time the bill was filed to be submitted to the jury. This was a controverted proposition in the proof. The issue was material in one aspect of the case, for the rule is that a purchaser, after deed made, in the absence of fraud, concealment, or misrepresentation, has no remedy except upon the covenants in the deed, unless the seller is insolvent. *Land Co. v. Hill*, 87 Tenn., 598. The question of solvency, then, simply goes to the remedy. The bill in this case was not demurrable, for there was an allegation of insolvency.

If the covenants of the deed of warranty, seizin, right to convey or against incumbrances be broken and the grantor is insolvent, a Court of equity may restrain him from proceeding to collect the whole amount due for the purchase money, and may offset the damages occasioned by the breach of the covenants against such unpaid purchase money. *Young v. Butler*, 1 Head, 647.

On the subject of defective title and incumbrances the Court charged the jury, viz.: "It is insisted by counsel for Mrs. McElya that at the time of the sale of the property in controversy to her, a portion thereof was incumbered by a mortgage to the Southern Building and Loan Association and the balance thereof by mortgage to the Huntingdon Building and Loan Association; that the deeds to Hill had not then been recorded,

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and that the vendor, Jno. C. Hill, concealed from her the existence of such mortgages, and that she had no knowledge as to the liens created by said mortgages, etc., and that because of the failure on the part of said defendants to make known these facts to her, and concealment thereof, that the sale to her was fraudulent. If these facts are made to appear by a preponderance of the evidence, etc., this would be a fraud against Mrs. McElya, and you should so find in your verdict. If, however, you shall find that Mrs. McElya was informed by W. T. Baber, prior to the closing of the trade, that the portion of the property in controversy which he had previously conveyed to Jno. C. Hill was incumbered by a mortgage to the Huntingdon Building and Loan Association, which he was under agreement to satisfy, and that he would take steps to have the incumbrance removed, and that shortly thereafter he did so and procured a release from the building association by giving a mortgage on other property and procuring from the association, through its secretary, a release of the mortgage, the fact that the mortgage was unsatisfied at the date of the deed to Mrs. McElya would not in law amount to fraud.

“If you shall find that at the date of the conveyance to Mrs. McElya that Hill and wife were of opinion that the mortgage to the Southern Building and Loan Association had been satisfied, and that as to this they were mistaken, the fact

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being that it was then unsatisfied, the failure to inform her (Mrs. McElya) of this mortgage would not amount to a fraud. Or if you shall find that the mortgage to the Southern Building and Loan Association was paid off and discharged by the witness, Teachout, but the date of the payment not appearing, you are instructed that before Mrs. McElya can have relief on the ground of the failure to advise her of the existence of this mortgage, it would devolve on her to show that the mortgage was outstanding at the date of sale to her, and that if she has failed to do so she can have no relief on account of said mortgage."

It will be observed that the Chancellor in these instructions submits to the jury the question whether defendants concealed the said incumbrances from complainant at date of sale, proceeding alone upon the theory of fraud. But as we have already seen, a purchaser may be entitled to relief, in the absence of fraud, where the title is defective or the land incumbered and the vendor wholly insolvent. The Chancellor in his original charge ignored this aspect of the case, and there was no request from complainant's counsel for such an instruction, although fourteen supplemental requests were submitted by him. We are of opinion, however, upon examination of the record, that such an instruction would have been immaterial, since the proof shows that both of said mortgages have been satisfied. It is wholly immaterial whether

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they were satisfied prior or subsequent to the date of the deed from Hill and wife to Mrs. McElya. They were not incumbrances on the property at the date of the decree below. It has been held, in a case where rescission was asked upon the ground of a defective title, the vendor would be allowed a reasonable time to perfect his title, and if the after-acquired title be a good one, and there is no fraud, the complainant will be compelled to accept it. *Baker v. Shy*, 9 Heis., 89; *Topp v. White*, 12 Heis., 175. It is further assigned as error that the Court declined to charge fourteen supplemental requests submitted by complainant's solicitor. We have carefully examined these requests and find that most of them had been substantially charged and the remainder were properly refused.

In conclusion, we find the verdict of the jury and the charge of the Court are amply supported by the evidence.

Where a chancery cause is tried by a jury the verdict has the same force and effect as a verdict in a law cause, and will not be disturbed on appeal if there is any material evidence to support it. *Scruggs v. Heiskell*, 95 Tenn., 455; Shannon's Code, § 6286.

Affirmed.

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106	833
110	208
110	209

*(Jackson. May 24, 1900.)*1. RES ADJUDICATA. *General rule stated.*

The general rule is that the estoppel of a judgment or decree extends to all matters material to the decision of the cause which the parties, exercising reasonable diligence, might have brought forward at the time. The rule requires the whole subject of litigation to be brought forward by the parties, and the judgment concludes all matters, whether of action or defense, legally pertaining to that subject which, by the exercise of reasonable diligence, might have been brought forward. (*Post*, pp. 337, 338.)

Cases cited: *Thompson v. Blanchard*, 2 Lea, 531; *Boyd v. Robinson*, 93 Tenn., 2.

2. SAME. *What is not.*

A judgment obtained by a physician against his patient for professional services does not bar an action by the patient against the physician for damages caused by malpractice in the performance of such services, especially where the judgment was rendered upon enforced confession as a condition to the issuance of an injunction to prevent its use as a defense in the malpractice action. (*Post*, pp. 338-351.)

3. JURISDICTION. *Amount.*

In an action appealed from a Justice of the Peace, the jurisdiction of the Circuit Court is limited to the amount of the Justice's jurisdiction, both as to matters of claim or action, and as to matters of set-off or cross actions. (*Post*, p. 346.)

4. WITNESS. *Use of scientific works on cross-examination of expert.*

It is not error for the Court to permit counsel, as a means of testing the knowledge and accuracy of an expert witness, to read from standard works on the subject under investigation, and ask him whether he agreed with the views therein expressed. (*Post*, pp. 351, 352.)

Case cited: *Byers v. Railroad*, 94 Tenn., 350.

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5. DAMAGES. *Charge as to compensatory.*

In charging that plaintiff is entitled to compensation for his injury, it is misleading for the Court to use the words, "full, complete, and ample," as qualifying the compensation to be given by the jury. (*Post*, p. 352.)

FROM SHELBY.

Appeal in error from the Circuit Court of Shelby County. L. H. ESTES, J.

McFARLAND & NEBLETT and HENRY CRAFT for Sale.

EDGINGTON & EDGINGTON for Eichberg.

McALISTER, J. Wm. L. Eichberg recovered a verdict and judgment in the Circuit Court against Dr. E. Paul Sale in an action for damages for malpractice.

Dr. Sale appealed and has assigned errors. The record discloses that on the 19th of July, 1898, Dr. Sale recovered a judgment before a Justice of the Peace of Shelby County for the sum of thirty-five dollars for services rendered Eichberg in the treatment of his arm.

Sale appealed to the Second Circuit Court. It further appears that on the next day, to wit, the 20th day of July, 1898, Eichberg commenced this action against Dr. Sale in the First Circuit Court

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of Shelby County, to recover damages alleged to have been sustained in consequence of the maltreatment of his arm by Dr. Sale.

On the 14th of January, 1899, Eichberg, alleging various grounds, filed his bill in the Chancery Court of Shelby County to enjoin Dr. Sale against prosecuting his suit in the Second Circuit Court to recover his fees. The Chancellor granted an injunction upon the condition that Eichberg confess judgment for the amount claimed by Dr. Sale for professional services, and then in his fiat enjoined the judgment thus to be confessed. Counsel for Dr. Sale demurred to the bill. This demurrer was overruled, from which action counsel for Dr. Sale appealed to this Court. At the April term, 1899, the decree of the Chancellor was reversed and the cause remanded for further proceedings, the Court decreeing that "matters should stand just as they were before the injunction was sued out."

Thereupon the counsel for Dr. Sale pleaded in the present cause, first, the general issue, and, second, as *res adjudicata* the judgment confessed by Eichberg for the sum of thirty-five dollars, as directed in the fiat of the Chancellor. It should be stated that the chancery proceedings are still pending, and no further steps appear to have been taken in said cause since it was remanded by this Court.

It is assigned as error that the Court left the jury

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to determine from the evidence what questions were involved in the cause of *Sale v. Eichberg* in the Second Circuit Court, wherein Eichberg confessed judgment. It is also assigned as error in this connection that the Court charged the jury that unless, as matter of fact, Eichberg made a claim in that cause for improper or negligent treatment, such as he was making in this cause, Eichberg was not estopped from recovering. It is also insisted the Court erred in refusing the following instruction submitted by counsel for Dr. Sale, to wit: "If you find from the evidence that the services for which suit was brought before the Justice of the Peace and upon which judgment was recovered by confession in the Circuit Court of Shelby County, were the services performed by Dr. Sale in attention to the arm of plaintiff and were the same services which are complained of in this suit as having been negligently and improperly performed and for which damages are claimed in this suit, that then the confession of the judgment in the Circuit Court is a bar to recovery in this suit, and that upon such bar their verdict should be for defendant."

It is insisted on behalf of plaintiff in error that the merits of the two suits involved the single question, whether Dr. Sale's services had been such as a competent surgeon of ordinary skill and ability should have rendered. It is argued that when Eichberg confessed judgment for

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the amount of the account he confessed that the services had been such as claimed, and that he could not relitigate that question in the present suit and claim that the services were so negligently and ignorantly rendered as to amount to malpractice. It is said that as a matter of fact the services rendered were not such as a surgeon of ordinary skill and ability would have rendered, and, in consequence thereof, Eichberg suffered injury; this afforded him a complete defense to Sale's action upon the account, and, further, that by way of cross action he could have set up his claim for damages. Therefore it is insisted that the suit of *Sale v. Eichberg* on the account embraced the whole subject at issue between the parties, and that the confessed judgment therein is final and conclusive of this case. Counsel cite in support of his position *Thompson v. Blanchard*, 2 Lea, 531, viz.: "The estoppel of a judgment or decree extends to all matters material to the decision of the cause which the parties, exercising reasonable diligence, might have brought forward at the time. The question then is, Was the question of whether these legacies were special or general directly involved in the former suit? We are compelled to say it was. The defendant might have insisted that they were general legacies, and if the Court had so held the land could not have been sold."

In the case of *Beloit v. Morgan*, 7 Wallace,

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623. the Supreme Court of the United States says: "In deciding this question I believe I state the rule of the Court correctly, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as a part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res adjudicata* applies, except in special cases, not only to the points upon which the Court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

"A party can no more split up defenses than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction."

The last case was cited with approval by this Court in *Boyd v. Robinson*, 9th Pickle, 2, and the same rule announced. Counsel then cite cases to show that this rule has been applied in actions against surgeons and physicians to recover damages.

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for malpractice. In *Bellinger v. Craigen*, 31 Barbour, 534, "a patient claimed damages from a physician on account of alleged malpractice. The physician denied the allegations and answered, especially alleging negligence on the part of the patient. After issue was joined the physician sued the patient before a Justice of the Peace for the value of services rendered. The patient denied the allegations in the complaint, and also averred that the services were so unskillfully performed that they were of no value, but on the trial he was allowed to withdraw such answer and all claim and defense founded upon any want of care in the physician, over the objection of the physician, who got a judgment for the value of the services. The physician's contention in the action for malpractice, therefore, was that the patient's right to recover damages was barred by the recovery in the Justice's Court. The Court upheld his contention upon the ground that the judgment of a competent Court was not only conclusive on all questions actually and formally litigated, but as to all questions within the issue, whether formally litigated or not.

"The Court pointed out that the law implies a promise on the part of the surgeon, that he has ordinary skill and ability, and that he will execute the business intrusted to him with ordinary care and skill; and if he fails in his duty, he is guilty of default in his undertaking, and cannot

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collect the pay for his services, but is liable in damages to the person who employed him; and, further, that the contract was entire, and that performance was necessary in order to entitle him to recover; and it further pointed out that in such cases the burden of the proof was cast upon the defendant to disprove the allegation of performance in such a complaint, and that if he neglected to offer any such proof, that fact of performance was presumed, and necessarily must be so in order to authorize the physician to recover for his services.

“In *Blair v. Bartlett*, 75 N. Y., 150 (Am. Rep. 455), the Court stated that it must be considered as settled in that State, that a judgment in favor of a physician and surgeon for his professional services, rendered by a Court of competent jurisdiction, in an action where the defendant appeared and confessed judgment for the amount of the services, is a bar to an action by the defendant against that physician and surgeon for malpractice in rendering those services. The Court cited and approved *Bellinger v. Craigen*, supra, and *Gates v. Preston*, 41 N. Y., 131.

“In the case of *Gates v. Preston*, supra, action was brought against a surgeon, and subsequent to the commencement thereof, and after answer by him, he commenced an action and recovered his fees upon a written confession of judgment signed by the patient in open Court. It was held that

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such judgment barred the patient from recovering damages for malpractice. The Court said that in a case where the judgment was upon confession, the right of action was by implication admitted, and that in such a case the express and direct admission of the right to recover, and the consent to the entry of a judgment, was an admission on the record of all the facts which the surgeon would have been bound to prove on a trial of the cause of action alleged by him in his complaint." *Dunham v. Bower*, 77 N. Y., 76; 1 Herman Estop. sec. 235.

"In *Howell v. Goodrich*, 69 Ill., 556, action was brought against a surgeon for alleged malpractice. The defense of *res adjudicata* was interposed, the plea showing the recovery by the surgeon of a judgment for his fees. The plea was sustained. In this case, however, the defense of malpractice had been set up in the former suit by the physician to recover his fees, in which judgment was rendered in the physician's favor, the Court finding there was no malpractice."

"In *Haynes v. Ordway*, 58 N. H., 167, it was held that a judgment in favor of a physician in a suit against him for malpractice bars the defense of malpractice in an action by him for his fees."

"In *Goble v. Dillon*, 86 Ind., 327 (44 Am. Rep., 308), which was an action for damages against two physicians for malpractice, one filed a

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plea showing that he had recovered judgment for his fees. His plea was sustained. The Court pointed out in its opinion that the matters in issue in the two cases were the same—namely, the character and value of the services rendered by the physician—and that in the suit by the physician against the patient evidence that the treatment was unskillful and negligent would have defeated the action, while, on the other hand, in a suit by the patient against the physician, evidence that the treatment was skillful and proper would have defeated the action. And that although the object of the suits might be different, yet by way of evidence, the former judgment must be conclusive.”

There is, however, an apparent conflict of authority on this subject, for we find another line of cases which hold that the patient has a remedy, although the physician may have recovered a judgment for his fees, but in most, if not all, of this class of cases the judgment was by default, and not confessed nor upon the merits. Thus in *Ressequie v. Bowers*, 52 Wis., 650, “which was an action for damages for malpractice, the defendant set up in bar a judgment recovered by him for the same services in a Justice’s Court upon default, but the Court held such judgment did not bar the plaintiff’s right of action for damages for malpractice, upon the ground that the question had not been litigated in the action before the Jus-

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tice." So in *Sykes v. Bonner*, 1 Cin. Sup. Ct. Rep., 464, it appeared that a judgment had been rendered against a physician for malpractice. A new trial having been granted, the physician brought suit for his fees and obtained judgment by default, which he pleaded as a defense upon the second trial of the suit for malpractice. It was held that the plea was no bar in that action, as the judgment he had obtained for his fees was by default.

In the case of *Lawson v. Conway*, 37 West Va., 159, the Court, after reviewing the authorities, said, viz.:

"I think a safe conclusion to be reached is that if the physician sue for compensation for his services, and there is no appearance by the patient, a recovery by the former does not estop the latter from bringing his cross action for malpractice; but if he appear (unless the record show that it was not to defend, but solely to disclaim the waiver of his own right), he is estopped by the recovery. . . . And if the patient has appeared in the suit by the physician, he was bound to make all the defenses he had, and hence he is estopped by the fact that he had a defense of malpractice, of which he failed to avail himself. But if he has not appeared, then the question of malpractice has never been adjudicated, and he is at liberty to assert his claim by independent action."

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In *Goble v. Dillon*, supra, "the Court recognized the distinction taken in *Ressequie v. Bowers*, 52 Wis., between cases in which the judgment had been rendered by default and those in which the Court has given judgment upon the merits, and held that if the action in which the physician recovered his services had been undefended, the judgment recovered in it could be no defense in an action by the patient for malpractice."

The last case on this subject to which our attention has been called, is *Jordahl v. Berry*, 72 Minn., 119, and reported in 45 Lawyers' Reports Annotated, 541, with an able and elaborate note, which we have found highly instructive in the examination of the subject. The syllabus of that case is that a judgment by default in an action by a physician against his patient to recover for professional services, is not a bar to an action by the patient against the physician for damages caused by malpractice in the performance of such services. The Court in that case dissented from the New York rule, and was of opinion the other view was safer, more convenient, and more equitable in practice.

Judge Mitchell, the writer, stated that the conflict of opinion among the Courts gave rise to an extended and somewhat energetic dispute among text-writers. Mr. Bigelow discusses the subject at some length, and earnestly insists that the New York doctrine is wrong. Estoppel, page 174. Mr.

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Van Vleet takes the same side of the question. Former. Adjudication, Sec. 168. Mr. Black, while not discussing the matter at any great length, indorses the doctrine opposed to that of New York as being much better supported by legal reason and the best considerations of convenience and justice. 2 Black on Judgments, Sec. 769. Mr. Brown, in his note to *Ressequie v. Bowers*, 52 Wis., 650, says of the New York doctrine, that while unquestionably right in theory, it may well be doubted whether it is convenient or safe in practice; that such estoppels are odious at best, and are founded on a technicality, and probably promote more injustice than they prevent.

On the other side Mr. Herman urges with great earnestness that the New York doctrine is sound, and the Courts which have come to an opposite conclusion violate every principle upon which the doctrine of *res adjudicata* is founded. Estoppel and Res Adjudicata, Sec. 231 *et seq.*

The writer does say in the course of that opinion, illustrating the injustice of the New York rule, "if plaintiff had appeared and defended the action brought by the physician for his fee, he would have been put to the alternative of alleging the malpractice as a mere defense, or of setting it up as a cross claim. In either case the judgment would be a bar or estoppel on that issue. If he had adopted the latter course, he could only have recovered one hundred dollars, the limit

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of the Justice's jurisdiction, and could never have recovered any more in another suit, because he would not be allowed to split a single cause of action. On the other hand, had he set up the malpractice merely as a defense, and the claim of defendant for services was less than fifteen dollars, the issue involving a claim of \$5,000 would have been conclusively determined by the judgment of the Justice," etc.

Counsel for Dr. Sale, in criticizing this case, say Eichberg was not hampered by any question of Justice's jurisdiction, that his case was in the Second Circuit Court, where he could in a cross action have recovered whatever a jury might have given him. But in this position counsel is mistaken. The case having originated before a Justice of the Peace, the Circuit Court, in trying the cause on appeal, would be limited to the same jurisdiction, as to amount, that limited the Justice of the Peace, to wit, five hundred dollars.

An illustration given by the Minnesota Court demonstrates how utterly impracticable, as well as inequitable, the New York rule necessarily is.

An examination of the two classes of cases cited will show that they are distinguishable in this important attribute—that where judgment is by default no estoppel arises, but where there is a judgment on the merits, or a confessed judgment, the matter is *res adjudicata*. In two of the New York cases the defendants appeared and answered,

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but afterwards withdrew their answers and permitted judgment to be rendered for plaintiff. In the other case there was a written confession of judgment. In neither of them was there a judgment by default in the usual and ordinary acceptation of that term. But in the other class of cases, in which it is held that the judgment is no bar, there was default made in appearance and defense.

Now, it is insisted in the present case that the judgment in favor of Sale against Eichberg for fees, was a confessed judgment, and, therefore, a bar within the rule recognized in both classes of cases.

Mr. Black says: "A judgment entered upon confession without action is as conclusive as any other judgment, and is equally protected against collateral attack or impeachment; and, like a judgment rendered after a contestation of the merits, it operates as a merger of the cause of action, and while it remains in force the plaintiff cannot maintain an action for the same claim or demand. Black on Judgments, Sec. 698.

"Judgments by confession or consent, if given intelligently and voluntarily, without collusion or fraud, are conclusive." Am. & Eng. Enc. Law, Vol. 21, page 267; *Nashville R. R. Co. v. United States*, 113 U. S., 261.

With these definitions and principles in view, we proceed to inquire what is the character of the alleged confessed judgment upon which the plaintiff

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in error relies in this cause as a bar to the suit against him for malpractice. As already stated, Dr. Sale brought his suit for fees in the Justice's Court, on the 19th of July, 1897, and obtained a judgment by default.

Eichberg appealed to the Second Circuit Court. On the next day, to wit, July 20, 1897, Eichberg commenced his suit against Sale for malpractice. It further appears that on the 14th of January, 1899, Eichberg filed the bill already mentioned against Sale, to enjoin the latter's suit for fees pending in the Second Circuit Court. Complainant alleged in that bill the employment of Sale, the maltreatment of the fractured arm and the pendency of the suit for damages in the First Circuit Court, and the suit of Sale for fees in the Second Circuit Court. It was alleged in that bill that when complainant refused longer to submit to Sale's treatment he asked Dr. Sale for his bill and the latter informed him there was nothing due whatever. The bill then proceeds, viz.: "Your orator is advised by his counsel that if the said Sale should obtain a judgment upon the trial of the cause in the Circuit Court, it would be pleaded as a bar by said Sale, which he at once would proceed to do. . . Your orator is without a remedy to extricate himself from the dilemma which this shrewd defendant has placed him in, except to apply to this Honorable Court to compel an election by defendant to try the suit for

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damages first, or, in default of such election, if the suit for services is tried first, it will be upon defendant's election to waive his right to rely on any judgment he might obtain, either as evidence of his rights in the suit for damages or as ground for a plea upon which the damage suit might be defeated. Your orator is willing to assent and agree that a judgment may be entered against him for the amount sued for, whether at law in the pending case for services or in this Court in this cause, if the damage suit is decided against him." Complainant prayed for an injunction restraining defendant from further prosecuting his said suit for services until after the suit for damages is tried and disposed of, or that any judgment he may obtain for services shall not operate as evidence for him in said suit for damages, and that he shall not plead or set it up in any manner as a defense to said suit for damages, etc. The following is the fiat of the Chancellor, to wit:

"To the Clerk and Master of the Chancery Court of Shelby County:

"Upon the execution by the complainant in the foregoing bill of a bond for costs and an injunction bond in the penalty of one hundred (\$100) dollars, conditional as prescribed by law, with good and approved security thereon, and on a confession of judgment by complainant in the

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Second Circuit Court, issue a writ of injunction restraining defendant from taking any steps toward a collection of said judgment, or in any way attempting to use same as a defense to complainant's damage suit.

"This 25th day of January, 1899.

"LEE THORNTON, *Chancellor*.

"Defendant Eichberg thereupon, in accordance with the directions of said fiat, and in order to avail himself of the benefit thereof, comes into open Court and waives the jury heretofore demanded, and hereby confesses judgment in favor of plaintiff for the amount sued for of \$35.00 debt and \$1.00 interest thereon, making the sum of \$36.00, together with the costs of these proceedings."

It will thus be seen that the alleged judgment was confessed, under the fiat of the Chancellor, for the very purpose of preventing an estoppel. Complainant, in his bill, denied that he owed Dr. Sale anything for professional services, and to say that he is now estopped by a judgment confessed under the circumstances stated, would be a singular perversion of complainant's acts and intentions plainly expressed. Moreover, the decree of this Court in the injunction suit, rendered at the April term, 1899, reversing the decree of the Chancellor, recited "that matters should stand just as they were before the injunction was sued out." We hold that no such legal anomaly and obliquity

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can result from the acts of complainant, and the alleged confessed judgment is no bar to a prosecution of the suit for malpractice. There was no error, therefore, in the charge of the Court on this subject.

The third assignment is that the Court erred in excluding, on cross-examination of Dr. Raymond, one of plaintiff's witnesses, the reading of extracts from the standard work of Dr. Hamilton as to diagnosis and treatment of fractures like that of Eichberg. Counsel stated at the time that, among other grounds, the question was competent to test the experience of the witness and his familiarity with the leading authorities upon that subject. Counsel stated he did not propose to introduce the book itself as evidence, but simply wished to test the witness as an expert, and the accuracy of his opinion and statements. It was held by this Court, in *Byers v. Railroad*, 10 Pickle, 350, viz., when a witness is testifying as an expert it is competent to test his knowledge and accuracy, on cross-examination, by reading to him or having him read extracts from standard authorities upon the subject-matter involved, and then asking him whether he agrees or disagrees with the authorities, and then by comparing his opinion with those of the writer." See, also, *Strandmeyer v. Williamson*, 29 Ala., 558. It is true the witness, after having been examined at great length in chief, finally, on cross-examination, said he did

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not claim to be an expert. The witness was a practicing physician, and had expressed his opinion quite freely in respect of good practice and proper treatment in such cases. The defendant was entitled, on cross-examination, to test the witness' knowledge in the manner indicated, and the Court was in error in excluding the question propounded.

It is also assigned as error that the charge of the Court on the measure of damages was erroneous. The Court charged that in such case the law fixes the standard by which the injury shall be measured, which is "full and complete and ample compensation to the injured person; the injured person is entitled to be placed as near as may be in the condition they would have occupied if the negligent or unskillful treatment complained of had not been given him."

We think this charge objectionable, in that it was repeated and thus emphasized to stimulate the jury in assessing damages beyond the rule of simple compensation. The true rule in such cases is "compensation," and such adjectives as "full, complete, and ample" compensation may well convey to the mind of an ordinary juror the impression that something more than compensation was the meaning of the charge.

For the errors indicated the judgment is reversed and the cause remanded.

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JOHNSTON v. GROSVENOR.

(Jackson. June 5, 1900.)

1. BUILDING AND LOAN ASSOCIATIONS. *Method of adjusting accounts with borrowing stockholder.*

A borrowing stockholder, in the adjustment of his accounts with a building and loan association, is not entitled to credit, on his debt for dues paid on his stock while the association remained a going concern. He gets the benefit of these payments alone in the value of his stock. But he is entitled to credit on his debt for dues paid on his stock, without knowledge of the condition of the association, after it had become insolvent or had abandoned its organization. (*Post*, pp. 358-362.)

Case cited: *Hargo v. Rogers*, 92 Tenn., 35.

2. SAME. *Mortgage not barred by ten years statute of limitations, when.*

A mortgage taken by a building and loan association from its borrowing stockholder is not barred by the mere lapse of ten years from the date of maturity of the secured debt, where it is not contemplated that the debt shall be paid otherwise than by the borrower's payment of dues on his stock, thereby maturing it. To set the statute of limitations in motion against such mortgage, there must occur a breach of the contract by dissolution or insolvency of the association, or by default of the borrower in payment of dues, interest, or other legal charges, and, in such case, the statute begins to run only from date of such breach. (*Post*, pp. 362, 363.)

Cases cited: *McElwee v. McElwee*, 97 Tenn., 649; *Runnells v. Jacobs*, 100 Tenn., 397.

3. SAME. *Insolvency and its results.*

The insolvency of a building and loan association, meaning thereby that condition of its affairs in which it is unable to pay back to its members the amounts paid in by them respectively, dollar for dollar, puts an end at once to its operations, and, as it thus prevents the stock from maturing and extinguishing the loans, according to the contracts between the association and its borrowing members, constitutes a breach of those contracts, and, on the one hand, excuses the borrow-

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ers from all further liability for the payment of dues and fines, and on the other renders the mortgages given to secure the loans due and enforceable at once, without regard to their terms and even though payable in installments. (*Post*, pp. 363-367.)

4. **SAME.** *Condition of, that releases members from liability for dues.*

The condition of a building and loan association is such as to constitute a breach of its contract with borrowing members, and to forfeit its right to collect dues from such members, where its assets are confessedly insufficient to meet its liabilities to its members, and where it has, for two years, ceased to make new loans, or to do business other than in the direction of winding up its affairs, and all of whose officers and directors had resigned or signified their purpose to do so. (*Post*, pp. 367-370.)

5. **SAME.** *Borrower entitled to credit for value of his stock without deduction of attorney fees and expenses for its collection.*

The Court holds that the borrowing member is entitled, under the facts of this record, to credit upon his mortgage debt for the full value of his stock, without paying same into Court, and without any deduction for attorney's fees or expenses that the association may have incurred in its collection. (*Post*, p. 370.)

6. **CHANCERY PLEADING AND PRACTICE.** *Refusal of leave to file amended and supplemental bill not erroneous, when.*

The Chancellor, in refusing complainant leave to file an amended and supplemental bill presented four and one-half years after the filing of the original bill and answer thereto, does not constitute such abuse of discretion as demands reversal by this Court. (*Post*, pp. 370, 371.)

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
JNO. I. T. SNEED, Ch.

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W. A. COLLIER and JOHN JOHNSON for Johnston.

SMITH & TREZEVANT for Grosvenor.

McALISTER, J. Complainant, on July 13, 1895, filed this bill to enjoin the sale of certain real estate in the city of Memphis, which had been conveyed by her to Chas. N. Grosvenor, trustee, by trust deed, to secure a certain loan of money due the Clerk's Building Association of Memphis. The theory of the bill is that upon a fair settlement with said building association, she is not indebted to it in any amount. Complainant further charges that about 1886 said association ceased to do a building and loan business, for which it was organized, and since that time has virtually been in liquidation; that it had few, if any, meetings of its stockholders or directors, and had no organized board of directors or official place of business, and had long since ceased to be a going concern. It was further charged that when complainant subscribed for her stock she was assured it would reach a par value, probably in eight, and certainly in ten, years; that her two notes aggregated \$1,800, but that she had received thereon less than \$900; that she had paid into said association double the amount she had received, and yet it was claimed by said association she still owed it \$1,304, with interest, since October, 1893.

Complainant further alleges that said association

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is only entitled to collect the actual amount received by her, with interest, less whatever complainant may have paid into its treasury on account of dues, interest, or otherwise. Complainant prayed that said association be required to answer fully and give the amount of its capital stock in 1884 and now; that it report its assets and liabilities; that it state its present officers, when it had its last meeting of stockholders, and who was present at such meeting; that it show its income and expenses, its withdrawing stockholders and the amount paid each, and that her notes be brought into Court and canceled.

The defendants answered the bill admitting that complainant was owner of nine shares of the capital stock of the par value of \$1,800, but averring that she had been paid thereon the sum of \$1,340, the premium on said two loans being \$460. The answer admits that at the time Mrs. Johnson ceased paying, in November, 1890, all of the non-borrowing members had withdrawn, or had given notice of withdrawal, excepting three, and all borrowing members had done likewise save four.

It is admitted that the association has not made a loan since 1886, but it is averred that it has, nevertheless, continued to use its corporate franchises, and has been receiving the monthly payments of dues and other debts. Respondent denies that Mrs. Johnston was assured that her stock would reach par in eight or ten years. It denies

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that it has no legally organized board of directors, or that it has long since ceased to be a going concern. Respondent denies all the material allegations of the bill.

Proof was taken, and upon the hearing the Chancellor decreed in favor of the defendant association, and ordered a reference to the Clerk to ascertain and report amount due on the principles stated in *Hargo v. Rogers*, 8 Pickle, 35. The Clerk reported the sum of \$1,280 due from complainant, excluding all payments made by her on the stock. Accordingly the report was confirmed, the injunction dissolved, and the trustee ordered to sell the property for the satisfaction of said decree.

Complainant appealed and has assigned errors.

The first assignment is that the Chancellor erred in holding that this case was controlled by the principles announced in *Hargo v. Rogers*, and that said decree was clearly erroneous in not giving complainant credit by dues and payments on stock.

The second assignment is that the association, having held no meetings, made no loans, ceased to do business and abandoned its organization since 1886, it was error in the Chancellor to hold complainant liable for more than she actually received from said association, and in refusing to give her credit by all sums paid, whether as dues or interest, or otherwise.

The third assignment is that the Chancellor was

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in error in decreeing a foreclosure of the first deed of trust, because the same was barred by the statute of ten years.

The fourth assignment is that the Court erred in refusing to permit complainants to file an amended and supplemental bill, etc.

The facts necessary to be stated are the following: In 1884 complainant subscribed for seven shares of the stock of said association, of the nominal value of \$200 per share, making \$1,400. In 1885 she subscribed for two additional shares, making \$400. Under the by-laws of the company, she was required to pay for this stock at the rate of one dollar per share, per month, making nine dollars per month on the whole stock. In April, 1884, complainant, by competitive bidding, borrowed of said association, on seven shares of her stock, the sum of \$1,400 (less the premium of \$350), for which she executed a deed of trust on two store houses on Poplar street, in Memphis, to Chas. N. Grosvenor, trustee.

Complainant was expected to continue the monthly payments of dues, and 6 per cent. interest, upon the \$1,400, until such payments, augmented by the interest of the borrower in the profits to be earned by the association, should reach the valuation of \$200 per share. It appears that Mrs. Johnston's subscription was to a series issued eight months prior to that time, and it became necessary for her to pay the arrearages on that stock,

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amounting to \$56. This amount, together with the insurance, and other items of expense, were deducted from her loan. The account stood as follows: Amount to be loaned, \$1,400; premium on 7 shares, at \$50 per share, \$350; net result to Mrs. Johnston, \$1,050. The statement given her by the Secretary, and pasted in her pass book, shows that this money was paid out to and for her, as follows:

MEMPHIS, TENN., April 29, 1884.

Seven shares of stock, September to May, '87..	\$ 56 00
Cost of abstract	53 00
One month's interest	7 00
Recording trust deed	3 00
Paid Handwerker for investigating taxes..	5 00
Paid Trezevant	21 00
Cash handed you this day.....	500 00
	<hr/>
	\$ 645 00
	<hr/>
Amount your credit loan.....	\$1,050 00
Amount paid you	645 00
	<hr/>
Amount still due you.....	\$ 405 00

Mrs. Johnston admits that she received the \$500, and we find that the other items stated in her pass book, and which were paid out for her, were proper charges.

The sum of \$405 was retained by the Secretary, as indemnity, against delinquent taxes on this property, which Mrs. Johnston agreed to pay. It further appears that in March, 1885, Mrs.

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Johnston subscribed for two additional shares, and borrowed upon them, at a premium of \$55 per share, netting her the sum of \$290, which she received in cash. Complainant makes no complaint in her bill about the second loan. She executed her note for \$400—the nominal value of the two shares of stock, and also a second mortgage to Grosvenor, trustee, on the Poplar street property. It further appears that the taxes on the property, for which the \$405 was retained, were not paid by Mrs. Johnston, and that current taxes were being neglected. Complainant was in possession of the property and receiving the rents until 1895, when a receiver was appointed.

The tax abstract on file shows an indebtedness of about \$800 for taxes, interest and penalties.

The association, through its secretary, rendered the following statement, showing how said \$405 had been disbursed, to wit:

Paid W. A. Collier, complt's attorney.....	\$131 85
Dues and interest	77 00
S. & C. taxes, 1884.....	22 70
T. D. taxes, 1885.....	47 00
People's Insurance Co.	27 25
W. L. Parker	23 20
Dues and interest	76 00
	<hr/>
	\$405 00

The only items of this account challenged by Mrs. Johnston were those of seventy and seventy-

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six dollars, respectively relating to dues and interest. She claimed she had paid these items herself, and her contention was sustained by the Master, and she was allowed this credit.

It appears that after these two loans had been running, between five and six years Mrs. Johnston ceased to make any further payments, and at the date of the filing of the bill it was claimed she owed \$1,300. Her last payment was made in November, 1890.

It appears the company owes no debt, excepting a balance of \$2,900, due to thirteen nonborrowing shareholders, who have been paying their monthly contributions, looking to the expected maturity of their shares for reimbursement.

It is admitted that the company's resources have been exhausted, and this debt against Mrs. Johnston is its only asset. The company owes no money to outside parties, and is not insolvent in that sense, but it is admitted this is immaterial for the purpose of ascertaining the mode of settlement.

It is claimed by counsel for Mrs. Johnston that she has paid back more money than she received.

She received on first loan.....	\$1,050 00
She received on second loan.....	290 00
	<hr/>
Total	\$1,340 00

It is shown by her pass book that she paid back, on

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First loan	\$ 987 00
She paid back on second loan.....	204 00
	<hr/>
Total	\$1,191 00

But \$622 of these payments were made on stock. The rule laid down in *Hargo v. Rogers*, 8 Pickle, 35, excludes any credit on mortgage debt of payments made as dues on stock. But such payments stand to credit of borrower on books until time for final adjustment, when all stockholders, borrowers and nonborrowing, will be paid *pro rata* from the fund for ultimate distribution.

It is next insisted that the deed of trust sought to be foreclosed is barred by the statute of ten years. The deed of trust was executed in 1884, and no foreclosure was sought until 1895. *McElwee v. McElwee*, 13 Pickle, 649; *Romells v. Jacobs*, 16 Pickle, 397. A conclusive answer to this position is that no definite time is fixed in this deed of trust for the maturity of the debt. It is true the note secured by the trust deed is dated in 1884, and is payable one day after date, but under the scheme of building and loan associations it was not expected that the note would be paid, or the debt mature at once. The agreement of the mortgagor is to make his monthly payments until the stock matures, and he undertakes to secure the payment of a series of small sums during an indefinite period.

“Since a building association loan is intended

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not to be repaid, but to be extinguished by the maturity of the borrower's stock, it does not fall due until that event occurs, unless there is a default in the payment of dues, interest, or other charges, or the association becomes insolvent, or is dissolved, thus creating a breach of the contract, and consequently the mortgage given to secure the loan cannot be foreclosed except upon the happening of one of these events, for if the stock matures without default the loan and mortgage are *ipso facto* extinguished, and there can be no foreclosure," etc. Am. & Eng. Decisions in Equity, Vol. 5, page 264, note 10.

It is not pretended in this case there was any default in the payment of dues and interest by the mortgagor until November, 1890, nor is it shown that the association became insolvent prior to 1888, nor that the borrower's stock had matured. The attempted foreclosure *in pais* of this mortgage was made in 1895.

It is next insisted that this association had become insolvent in 1886, and had abandoned its corporate functions and purposes. The argument is then made that complainant was thereby released from any further liability as a member, either for payment of dues, or interest, or loan. The law on the subject is "that the insolvency of a building association, which is that condition of its affairs in which it is unable to pay back to its members the amounts paid in by them, respect-

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ively, dollar for dollar, puts an end at once to its operations, and as it thus prevents the stock from maturing and extinguishing the loans, according to the contracts between the association and its borrowing members, constitutes a breach of those contracts, and on the one hand excuses the borrowers from all further liability for the payment of dues and fines, and on the other renders the mortgages given to secure the loans due and enforceable at once, without regard to their terms, even though payable in installments, and the receiver can proceed to collect them, etc. 5th Am. and Eng. Decisions in Equity, page 278, note 20, citing many authorities.

Under the title, "Effect of Dissolution, or its Equivalent upon Membership Duties and Borrowers' Obligations," at Article 523, Mr. Endlich says:

"A dissolution, strictly speaking, of the association, of course, at once putting an end to all its corporate business, terminates the liability of members to continue the prescribed regular stock payments. Where that dissolution occurs in a contemplated course of events, no serious question can arise as to its effect upon the rights or duties of any class of members, but where it occurs prematurely the case is different. For the purpose of discussion of the questions thus arising, no distinction need be made between the dissolution properly and technically so called, and one practically resulting from the agreement of members or the insolvency

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of the association. In every case the effect upon the members is to stop at once any liability for further regular payments.

“The dissolution of the building association necessarily puts an end, not only to its capacity to receive, from time to time, his small payments, but also to the possibility of their being turned to account, for his benefit, by means of the system of investment and reinvestment peculiar to the building association scheme. The main feature which has made his undertaking bearable, and in reliance upon which he has been induced to assume its obligations, is thus taken away, and it follows as an inevitable consequence that he cannot be held to its precise terms. His duty to make regular stock payments, a duty incident to membership only, ceases, for the stock itself is destroyed, there being no longer a corporation as to whose stock it can figure, and the membership dies with the corporation. So far as the mortgage was given to insure the performance of this membership duty, the obligation is abrogated by the destruction of the stock and the society. The imposition of fines, a species of liquidated damages, due the society, under its system of mutuality for the neglect of a membership duty, must, of necessity, fall away when the membership is gone, when there is none who can justly claim the damages, and when their exaction would be nothing more nor less than the enforcement of penal-

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ties not countenanced by the law. The agreement to pay a premium for the loan, justified upon the basis of strict mutuality, and bearable by reason of the length of time allowed for its liquidation, and, by the fact that it would, according to the intent of the contract when entered into, be in part made up by profits upon the stock payment and interest discharged by the borrower during the projected continuance of the association, as well as by similar payments made by other borrowers during the like period and the gains and accumulations of the entire corporate business to the day of its contemplated termination, must, when that mutuality is taken away, and all the other elements embraced in the terms of its assumption removed, fail for want of a proper consideration, at least it fails in part.

“The insolvency of the company, as before observed, puts an end to its operations as a building association. To a certain extent, it also ends the contract between it and its members, respectively, and nothing remains but to wind it up in such a manner as to do equity to creditors and between the members themselves.

“The liability to pay monthly dues or fines or interest, on the amount advanced cannot extend beyond the existence of the association. . . . It would be most inequitable to oblige one party or those holding by assignment his interest, to continue to make the payments required of him by the con-

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tract, while the other party had incapacitated itself from carrying out the provisions made in the same contract for ascertaining the extent of the mutual obligations of the parties and for securing the performance thereof on its part."

In Am. and Eng. Enc. Law, 2d Ed. Vol. 4, page 1081, it is said, viz.: "All authorities agree that on the premature abandonment of the enterprise, from whatever cause, the original contract between the association and the borrower cannot be carried out, and that neither party is therefore bound to a literal fulfillment."

What, then, is the application of these principles in the present case? Counsel for the association states that it makes no claim of solvency, but denies that its organization has been abandoned. The record discloses that the association was incorporated in 1875, and down to 1884 issued fourteen different series of stock. It matured many of them and paid out thousands of dollars to stockholders. It had done an active business down to 1886, when it made its last loan.

The income of the association from dues and interest payments began to decline from September, 1885. At that date the secretary claims there were 1,133 contributing shares outstanding, but he admits the income from dues was only \$751 in September, 1888, the income from said source was reduced to \$545, in 1889 to \$264, in 1890, when

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complainant ceased paying, the income was \$150. In 1888 all the officers and directors of the association had either withdrawn or given thirty days' notice of withdrawal. Under the charter of the association, members not advanced, are entitled to withdraw their contributions and profits upon giving thirty days' notice of their intention to do so.

No fraud or bad faith on the part of the officers or directors of the company is shown, although charged and reiterated many times in the brief.

Complainant continued to pay her dues and interest regularly until November, 1890. At the time she ceased paying all of the nonborrowing members had withdrawn or had given notice of withdrawal, excepting three, one of whom owned ten shares, and continued to pay thereon until July, 1892; another, owning five shares, paid until December, 1891; and a third, owning five shares, ceased to pay thereon in January, 1893. It is further shown that four borrowing members continued to pay dues and interest after Mrs. Johnston stopped, and three of them have since been paid in full, while the fourth has received nearly his full quota. At the date of the answer filed herein there were thirteen unpaid nonborrowers, owning ninety-three shares of stock, upon which partial payments had been made, leaving due them about three thousand dollars (\$3,000). It ap-

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pears that the only assets of the association are the mortgage loan against this complainant, and a lot worth about \$300, bought in under a foreclosure.

It appears that in October, 1888, the board of directors, passed a resolution that all delinquents for dues or interest be placed in the hands of the attorney for collection, and under this resolution the attorney has since acted as liquidator of the association, collecting assets and distributing them in accordance with the charter and by-laws of the association, faithfully and efficiently. Prior to 1887, the attorney had been paid a salary of \$50 per month. In 1887 it was reduced to \$20 per month, and in 1888 the salary was discontinued altogether. The salary of the secretary was also stopped at that date, and no salaries have been paid since 1888. While the association had not made a loan since 1886, it has, since that time, been receiving monthly payments and collecting other debts due it and paying off its unsatisfied borrowers.

We are constrained to believe, from the foregoing facts, that this association was insolvent in October, 1888, and had practically abandoned the business for which it was incorporated. At that date it virtually went into liquidation, and there was no further obligation upon members to continue the payment of dues and interest, since in-

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solvency would prevent the stock from maturing and extinguishing the loans according to contract.

The complainant was under no obligations to pay dues and interest after October, 1888, but she continued to pay until November, 1890, ignorant of the true financial condition of the company. The insolvency of the association was known to its officers and unknown to the complainant. She was not liable for dues and interest after October, 1888, and is now entitled to recover said amounts, with interest, or to have them credited on her mortgage loan. In the statement of account by the Clerk and Master, the complainant is charged with interest on her mortgage loan from the time it was made. This is, of course, proper, under the Hargo rule. It is conceded by the counsel for the association that complainant is entitled to share in the distribution of amount due on her mortgage loan, but it is insisted she must first pay balance due, and after expenses and attorney's fees are collected, she will get her *pro rata* of this fund.

We think she is entitled to this *pro rata* before expenses of collection are deducted, and this amount will be credited on balance due by her.

On the basis indicated the account will be recast. There was no abuse of the Chancellor's discretion in refusing to permit the amended and supplemental bill to be filed. The original bill herein was filed July, 1895, and the answer.

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August, 1895, while the amended bill was not offered until January, 1900. The costs of the appeal will be paid by the building association. The costs of the Court below will remain as taxed by the Chancellor.

Dillard & Coffin Co. v. Smith.

DILLARD & COFFIN CO. v. SMITH.

(Jackson. June 26, 1900.)

1. FRAUDULENT CONVEYANCE. *Example of.*

A conveyance is fraudulent in fact and void upon attack of the grantor's creditors, where one, indebted to insolvency and sorely pressed by his creditors, transfers, without making any provision for his creditors, his entire property, consisting chiefly of a stock of goods, to a brother, who was not a merchant or financially responsible, taking his note, without security, for the larger portion of the purchase price, and permitting the brother to retain the remainder upon an unfounded claim, it appearing that both parties co-operated at the time and afterwards in a scheme to defeat the grantor's creditors. (*Post*, pp. 373-380.)

Cases cited: *Robinson v. Frankle*, 85 Tenn., 484; 6 Wall., 299.

2. SAME. *The creditor's lien and its enforcement.*

From the date of filing his bill to set aside his debtor's fraudulent conveyance, the creditor acquires a lien upon the property involved, enforceable against the whole world, although the bill may not have been sworn to, and did not seek attachment or injunction or otherwise actually impound the property; and, in such case, the creditor may, by supplemental proceedings, follow the property into the hands of purchasers *pendente lite*, who, of necessity, take same with *its pendens* notice of the creditor's rights, and may recover same or its proceeds from such purchasers, or obtain judgment for its conversion, being entitled, of course, to only one satisfaction in case of judgments against successive purchasers of same property. (*Post*, pp. 380, 381.)

Code construed: § 6097 (S.); § 5031 (M. & V.), § 4288 (T. & S.).

Cases cited: *August v. Seeskind*, 6 Cold., 166; *Brooks v. Gibson*, 7 Lea, 271; *Mette v. Dow*, 9 Lea, 102; *Epperson v. Robertson*, 91 Tenn., 412; *Solinsky v. Bank*, 85 Tenn., 368; *Gage v. Epperson*, 2 Head, 669; *Arrendale v. Morgan*, 5 Sneed, 703; *Chesney v. Rodgers*, 1 Heis., 242; *Bank v. Haller*, 101 Tenn., 85; *Knott v. Cunningham*, 2 Sneed, 205; *Brown v. Kinchloe*, 3 Cold., 198; *Turner v. Brock*, 6 Heis., 50.

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3. **SAME.** *Set aside under bill objectionable as setting up antagonistic claims, when.*

Although a bill to set aside a fraudulent conveyance may be objectionable as seeking, in the alternative, to recover in affirmance of that conveyance, thereby uniting antagonistic grounds for relief, still complainant will not be repelled on this account, where this question was not made specifically by demurrer, and the alternative feature of the bill was abandoned in the preparation and prosecution of the case, and relief sought alone on the first ground stated in the bill. (*Post*, pp. 381-384.)

Cases cited: *Cunningham v. Campbell*, 2 Tenn. Ch., 713; *Bank v. Pettit*, 9 Heis., 447; *James v. Kennedy*, 10 Heis., 612.

FROM HARDEMAN.

Appeal from Chancery Court of Hardeman County. A. G. HAWKINS, Ch.

COOPER & WADDELL for Dillard & Coffin Co.

A. J. COATES for Smith.

WILKES, J. The firm of Smith Bros. was composed of T. M. Smith and J. L. Smith, and was engaged in the mercantile business at Cedar Chapel, in Hardeman County. On the first of January, 1898, the firm sold its stock of merchandise, together with a house and lot, a mule, horse, two-horse wagon, and cow, to Samuel Smith, a brother, the recited consideration being the satisfaction of a debt due to the brother from the firm of \$580, and a note

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for about \$1,570, payable to the firm April 1, 1898, the entire consideration being \$2,158. It appears that all the property belonged to the firm, and was used as partnership property, except the cow, and constituted virtually all the property, the firm or its members owned, and that they were in debt and insolvent, their matured debts being something over \$3,000.

The Dillard & Coffin Co. were creditors of the firm, by open account, for money advanced and paid out for them in the sum of \$1,809.30.

They pressed the firm for payments on their debt, and the firm promised them to ship them cotton and reduce the debt, and so wrote them on the 29th of December, 1897, before the conveyance on the first of January, 1898, promising also in the letter to call upon them by the third or fourth of January and confer in regard to the debt.

On the 28th of January, 1898, the Dillard & Coffin Co. filed their bill, attacking the conveyance to Samuel Smith as fraudulent, and asking that the goods be subjected to the payment of their debt. The bill was not sworn to, and did not ask for any extraordinary process, nor apply for a receiver. The prayer of the bill is that the conveyance be held fraudulent and all the property applied to complainant's debt, but that if the debt to Samuel Smith be held to be valid, and that he did not participate in the fraud, that he be

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required to pay the note into Court, and that the same be applied to complainant's debt. The bill did not allege that Samuel Smith had disposed of the goods, or any part of them, and did not ask a judgment for any amount on that account, but proceeded upon the idea that the goods were still in his hands and subject to complainant's debt, and that Samuel Smith was attempting to sell or dispose of them.

On April 1, 1898, on leave granted, complainant filed an amended and supplemental bill making W. O. Newsom, Robert Newsom, and J. S. Newsom also defendants thereto; and charging, in addition to the allegations of the original bill, that since it was filed Samuel Smith had sold part of the goods in ordinary course of trade, + and the remainder to the Newsoms, and that the Newsoms had actual and constructive notice of the existence of complainant's lien, and had purchased *pendente lite*, and with general notice of the suit and lien, and had since sold the goods, but the amounts and values received could not be stated. This amended and supplemental bill prayed for judgment against Samuel Smith and the Newsoms for the value of the goods received by them, respectively, and for general relief. The amended and supplemental bill does not charge fraud in the sale from Samuel Smith to the Newsoms, was not sworn to, did not ask any extraordinary process, or for a receiver, but was based upon

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the idea that complainant had a right to follow the goods into the hands of the Newsoms and subject them, and also to have personal judgment for such as were sold by either Smith or the Newsoms, respectively.

Smith and Smith Bros. answered the original bill, admitting the sale, but denying all fraud, and claiming that the same was *bona fide* and for full value; that the firm was owing Samuel Smith \$589.09, and he was demanding payment of same, and being unable to meet the demand, the sale was made for the purpose of paying this debt and the other consideration named.

They also answered the amended and supplemental bill and admitted that Samuel Smith sold a part of the goods in usual course of trade while he had them, and also had others and sold the remainder to Newsom & Co. The Newsoms demurred, but their demurrer was overruled with leave to rely upon the same grounds in the answer. They also answered that upon information they believed the sale from Smith Bros. to Samuel Smith was *bona fide* and free from fraud; that they purchased the goods and sold part in usual course of trade, and the remainder to Newson & Son, and the latter sold the stock in usual course, adding new goods until but little remained of the original stock. They further stated that they had no notice, actual or constructive, of any lien on the goods in complain-

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ant's favor, and, in addition, that they consulted complainant and was by him assured that he had no lien on the goods, and were advised to buy if they desired to do so, that they did buy and paid a full price, and they deny any right to any lien or personal judgment in complainant's favor.

Proof was taken and on final hearing the Chancellor gave judgment in complainant's favor for \$1,705.78 against Smith Bros., being the amount of the debt claimed, and held that the sale made by Smith Bros. to Samuel Smith was fraudulent and void as against complainant except to the extent of the debt due to Samuel Smith of \$589.08; that by the filing of the bill complainant acquired a lien on the goods in the hands of Samuel Smith and a right to an accounting for all of the same and a right to a personal judgment for all proceeds of goods sold beyond the amount of his debt, and the amount was fixed, after giving the credit for the debt at \$1,098.30, and for this judgment was rendered against them.

The Court further held that the Newsoms & Co. had notice of the claim of complainants and their lien and were liable to the extent of the value of the goods received by them and afterwards sold, which was fixed at \$133.38, and for this amount judgment was rendered against the firm of Newsom & Co. and its members, but it was

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further provided that a payment of either judgment should, as to complainant, be a satisfaction *pro tanto* of the others. The Newsoms and Samuel Smith appealed and assigned errors.

The first assignment is that the evidence in the case does not make out a case of actual fraud as to the purchaser, Samuel Smith. Whether the Chancellor so found does not appear from any express statement in his decree, and his view is only indicated by the recital that the sale was fraudulent and void except to the extent that Smith Bros. were indebted to Samuel Smith. The facts as shown by the record are that the Smith Bros. were indebted to insolvency and they were being pressed for payment. Samuel Smith, the brother, was a man not engaged in the mercantile business, and it is unreasonable that he should have bought this stock of goods from his brothers and involved himself therefor unless he believed them indebted to insolvency and either desired to aid them or protect his own debt. That the firm of Smith Bros. made the conveyance to protect themselves from their creditors can, under the record, admit of no doubt, and the subsequent dealing between the Smith Bros. and Samuel Smith leaves but little doubt that he was aiding them in this purpose, and after getting the amount claimed by himself, he turned the balance over to his brothers with the purpose that they should get the benefit of the same. It does

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not appear that Samuel Smith was a man of any property, and the origin and consideration of the debt to himself is not satisfactory to this Court, but upon this feature of the case there is no appeal. No security was demanded of Samuel Smith for the deferred payment, and it does not appear that he had any means outside of the goods themselves to pay the notes.

It was said in *Robinson v. Frankle*, 85 Tenn. Rep., 484, that "a sale by a failing debtor of all his available assets to a near relation, upon consideration of the payment of a large and suspicious debt to himself, and the execution of his unsecured notes, payable in six, twelve, eighteen, and twenty-four months, for a sum over and above his own debt and equal to all the other debts of the vendor in amount the purchaser being a man of no financial responsibility and having no reasonable means of paying such notes except from the assets so purchased, is fraudulent and void." In view of the insolvency of the Smith Bros., the pressure upon them for payment of debts owing by them, the sale to the brother, their efforts to sell the property afterwards at a reduced price, their refusal to apply the proceeds to their debt, their refusal to sell or pledge the note, the subsequent sale to Newsom & Co. pending the suit, for less than the stock cost, and the turning over the proceeds to the brothers, we think there is left no ground for doubt but that it was a

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scheme participated in by all the brothers to realize cash upon the goods for the benefit of the firm, after satisfying Samuel Smith's claim, which we do not consider made out, and stamps the transaction as one fraudulent in fact and law. *Clements v. Moore*, 6 Wall. (U. S.), 299. Without commenting seriatim upon the several assignments of error, we proceed to consider what we deem to be the determinative questions involved in the case.

Under the statute, Shannon, § 6097, it is said: "Any creditor, without first having obtained a judgment at law, may file his bill in chancery for himself, or for himself and other creditors, to set aside fraudulent conveyances of property or other devices resorted to for the purpose of hindering and delaying creditors, and subject the property by sale or otherwise to the satisfaction of the debt." Subsequent sections provide that attachment and injunction may issue and that no previous judgment at law is necessary to support the bill. Construing these sections, it has been held that the Court may subject the property proceeded against whether it has been seized or not, and that the omission to seize and impound the property pending the suit does not discharge or release the property from the lien. By force of the rule of *lis pendens* operating as constructive notice to all persons of the pendency and purpose of the suit, the lien follows into whoso-

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ever hands it may go and holds it wherever found subject to the satisfaction of the decree rendered in favor of the creditor complainant. *August & Bing v. Seeskind et al.*, 6 Cold., 166. And such lien is superior to any subsequent attachment levied on the same property (*Brooks v. Gibson*, 7 Lea, 271), or to an assignment in bankruptcy (*Mette v. Dow*, 9 Lea, 102). And the lien can only be defeated by failure of complainant to establish his debt or the fact of fraud. *Epperson v. Robertson*, 7 Pick., 412.

It is plain from this record that Newsom & Co. had not only constructive but also actual notice of this lien and of the fraud between the original parties, and that they must be considered therefore as having converted the goods and rendered themselves liable for the value of the same. *Solinsky v. The Bank*, 85 Tenn., 368; *Gage v. Epperson*, 2 Head, 669; *Arnendale v. Morgun*, 5 Sneed, 703; *Chesney v. Rodgers*, 1 Heis., 242; *Bank v. Haller*, 17 Pick., 85. And this liability exists at the same time and concurrently with that of Samuel Smith, though there can be but one satisfaction. *Knott v. Cunningham*, 2 Sneed, 205; *Brown v. Kinchloe*, 3 Cold., 198; *Turner v. Brock*, 6 Heis., 50.

The principle involved is that the goods having been fraudulently transferred, remain the property of the fraudulent grantor, and they may be followed by the creditor of the grantor until his liability is extinguished. Of course the parties re-

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ceiving or handling the goods can be held liable only to the extent of such goods in kind as they may have on hand and the value of such as they may have sold, and are not liable for goods sold by parties other than themselves with which they had nothing to do.

Upon this feature of the case a very ingenious and forceful argument is made that if the creditor elects to pursue one remedy it is an abandonment of the other; and limited strictly to the proposition as thus put, the principle is correct. But in this case the creditor seeks to avoid the sale as fraudulent, and to subject the goods as those of the debtor and at the same time to hold the fraudulent grantee liable for such as he has or may have converted since suit was brought.

It is true that in the prayer of his bill the complainant asks that if the sale to Samuel Smith be not found fraudulent, then that he be required to pay into Court the amount of purchase money. This could, of course, be done only upon the ground that the sale was valid and that the title to the goods passed to him, and to this extent the objects of the bill are inconsistent; but there seems to have been no sufficient demurrer on that account nor any motion to require complainant to elect upon which theory they would proceed, and he has proceeded upon the theory of a fraudulent sale and a consequent conversion of the property pending the suit and while the lien was upon

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the property. There is a general demurrer for multifariousness, but it does not specify in what particulars and is not sufficient and appears not to have been pressed.

We think, therefore, that the present case must be differentiated from cases cited by counsel which hold, in substance, that in cases of fraudulent transfers the creditor cannot pursue the goods of the debtor in the hands of the grantee and at the same time ratify the sale and collect the purchase money agreed to be given by the grantee for the goods upon the theory of a valid sale. Such is the holding of a number of cases, among which may be cited *Cunningham v. Campbell*, 2 Tenn. Chy., 713; *James v. Kennedy*, 10 Heis., 612-614; *Bank v. Petit*, 9 Heis., 447, 452.

But in this case complainant does not pursue or press his claim to collect the purchase money agreed to be given by Samuel Smith for the goods, but evidently abandons that as a theory not supported by the facts, and proceeds against the goods themselves, on the ground that they are still the property of the debtor because the fraudulent sale did not change title; and his right to recover personal judgment against Samuel Smith and his assignees is not rested upon any contract, but on the fact that pending the suit Smith and his assignees converted the goods, upon which the law had already fixed a lien from the filing of the bill.

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The decree of the Court below was not rested upon the theory that there was a valid sale to Samuel Smith, but that such sale was fraudulent and without consideration except as to the amount of Samuel Smith's debt, and the goods still remained the property of Smith Bros. and liable to their debts, and upon it complainant had fastened a lien which was defeated by the conversion of the goods with full notice of the lien by Samuel Smith and his assignees.

If the contention be true that goods impounded in a chancery proceeding by the filing of a bill can be sold and thus the lien given by law ignored and the property taken, as it were, from the custody of the Court without remedy against the party who thus takes them with full notice of the lien, then the statute to which we have referred is rendered entirely nugatory.

The goods are put in the custody of the Court by the filing of the bill, not perhaps as completely as if attached and put into the hands of a receiver, but sufficiently so as to enable the Court to protect its lien and hold those responsible who take the goods with notice of such lien.

We see no reversible error in the record, and the decree of the Court below is affirmed with costs.

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DUNSCOMB v. WALLACE.

(Jackson. June 27, 1900.)

1. CHANCERY PLEADING AND PRACTICE. *Final decree upon pro confesso proper, when.*

An averment in a bill that a defendant had fraudulently received and converted property of complainant's debtor, who was likewise made defendant, "worth between three and four thousand dollars," is sufficiently definite to justify a final decree, upon *pro confesso*, without evidence or reference, against such fraudulent grantee, for a debt, described in the bill as a judgment against said debtor, for \$803.05, dated May 23, 1892, being only about one-third the amount of the alleged liability of such fraudulent grantee. (*Post*, pp. 386-392.)

Cases cited: *Ross v. Meek*, 93 Tenn., 666; *Haralson v. McGavock*, 10 Lea, 719.

2. SAME. *Defendant entitled to benefit of denials of co-defendants answer, when.*

In a suit by a creditor to set aside a fraudulent conveyance of his debtor and to hold the fraudulent grantee liable for the value of the property, when the debtor answers on oath denying all fraud, there can be no decree upon *pro confesso* without proof against the fraudulent grantee, as he, in such case, is entitled to the benefit of his co-defendant's answer and denial. (*Post*, pp. 392-397.)

Cases cited: *Simpson v. Moore*, 5 Lea, 372; *McDaniel v. Goodall*, 2 Cold., 395; *Cherry v. Clements*, 10 Hum., 552; *Hennessee v. Ford*, 8 Hum., 500; *Petty v. Hannum*, 2 Hum., 102; *Caldwell v. McFarland*, 11 Lea, 467; *Phillips v. Hollister*, 2 Cold., 271;

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Butler v. Kinzie, 90 Tenn., 31; Smith v. Cunningham, 2 Tenn. Ch., 573.

FROM SHELBY.

Appeal from Chancery Court of Shelby County.
JNO. L. T. SNEED, Ch.

PIERSON & EWING for Dunscomb.

THOS. H. JACKSON and BOYLE & BOYLE for
Wallace.

McALISTER, J. The record in this cause presents a single question of chancery practice.

Complainant filed this bill alleging that on May 23d, 1892, he recovered a judgment before J. P. Young, Justice of the Peace, against Lymus Wallace for \$803.05; that execution had been issued and returned *nulla bona*.

It is alleged that Wallace had transferred, in fraud of his creditors, to O. B. Polk, "a large number of drays and mules and harness worth about three or four thousand dollars;" that Polk after a short time transferred the same to A. J. Warwick, who conveyed the same to W. B. Gates; that after a short season said Gates transferred the property to N. H. Williamson, who, in December, 1897, transferred the same to J. A. Post.

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It was alleged that the holding of said property by said Post was fraudulent, and that the alleged ownership of the property by Post was to place same beyond the reach of the creditors of Lymus Wallace.

It was alleged that in November, 1898, said Post transferred the property to Coates Bros., and that at the filing of the bill said Coates Bros. pretended to own the property.

A sworn answer was required, and the discovery sought material to this controversy was whether at the time of "the filing of the bill" any of the parties were indebted to said Wallace or knew of others who were so indebted to him, etc.

A decree was sought "against any of the defendants who may have at any time fraudulently colluded with the said Lymus Wallace, so that his property was placed beyond the reach of his creditors to their harm and detriment and to the prejudice of their rights."

September 1, 1899, the Clerk and Master entered a decree *pro confesso* against the defendant, Post. The other defendants all answered the bill under oath. Defendant Wallace, in his answer, denied that he had fraudulently concealed his property or been guilty of any scheme to hinder, delay or defraud his creditors, as claimed in the bill.

Wallace, in his answer, further states that about the 9th of May, 1893, defendant Warwick de-

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sired to engage in the business of hauling cotton, and in order to do so he had to procure the necessary mules and drays, and that Warwick then purchased from Wallace all the mules, drays and harness he had, and used them in carrying on said business of hauling cotton, and that after this sale to said Warwick of said property, he (Wallace) had no interest whatever therein; that in carrying on the business of hauling cotton Warwick employed him (Wallace) at a salary.

Wallace denies that he had any interest in the property sold to Warwick after the sale, and denies that he had any interest in the business of hauling cotton carried on by Warwick.

He states in his answer that after carrying on the business of hauling cotton for some years, Warwick sold out the personal property used in the business, and successive sales were made by the different parties from time to time, so that different parties at different periods owned and carried on the business and the property used therein.

Wallace, in his answer, denies that he was engaged in any fraudulent scheme with any of the defendants in this case, or that any of the defendants held property for him or were engaged in any attempt to assist him in hindering, delaying or defrauding his creditors, and denies that he himself at any time was engaged in any such fraudulent scheme.

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The other defendants, Polk, Williamson, Warwick, Gates and Coates, all answered under oath, and in their answers deny the frauds charged in the bill.

Defendant Williamson, who, it is averred in the bill, turned over the mules and drays and harness to Post, says in his answer that about May 9, 1893, Wallace sold certain stock, drays and harness to A. J. Warwick, and that about January 15, 1897, Warwick sold certain stock, harness and drays to W. B. Gates, and that thereafter the said Gates made the sale to him (Williamson); and he knows of no property held by any person belonging to Lymus Wallace.

The defendants P. S. and C. B. Coates, in their answer, state that on the 11th of November, 1898, they purchased of defendant Williamson certain drays and harness, and that when they purchased the property Williamson was in possession thereof as owner.

It will be seen from this sworn statement of Coates Bros. that Post never had anything to do with any of the property sought to be reached in the bill.

Coates Bros. deny that the property about which they answer was the same property that Lymus Wallace conveyed to A. J. Warwick. The latter, in his answer, states that he bought the property of said Wallace, and that he thereafter sold the same to W. B. Gates. O. B. Polk, in his an-

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swer, avers there were no mules, drays, or harness transferred to him, but that he sold the notes secured by a trust deed on this property to A. J. Warwick. Further, defendant Gates says he knows nothing whatever as to any arrangement Lymus Wallace had with Post, Polk, Warwick, or any other person who had owned the dray business.

On September 5, 1899, a decree was entered in the cause which recites that the complainant dismisses his bill as to the defendants O. B. Polk, A. J. Warwick, W. B. Gates, N. H. Williamson, C. B. Coates and P. S. Coates without prejudice. On the same day, without any evidence or any reference, another decree was entered as final, which is as follows:

"This day this cause came on for hearing and was heard before the Hon. John L. T. Sneed, Chancellor, upon the original bill, the agreement of Lymus Wallace filed herein on September 5, 1899, and the order *pro confesso* against J. A. Post, from all of which the Court doth here and now order, adjudge and decree that the complainant, S. H. Duncomb, have and recover of the defendants, Lymus Wallace and J. A. Post aforesaid, in the sum of \$1,116.22, with interest from November 18, 1898, the date of the filing of the bill herein, \$63.40, making a total of \$1,179.62, and all costs of this cause not hereto-

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fore otherwise adjudged, for which let execution issue as at law."

The defendant Post brought the case to this Court upon a writ of error. The first assignment is that the decree of the Chancellor is erroneous and should be reversed, for the reason that, upon a judgment existing against Lymus Wallace alone, it was adjudged that petitioner should be held for said judgment, with interest, when there is no evidence in the record, or allegation in any pleading to warrant a decree against petitioner for said amount or any other definite amount." The rule on this subject is stated in *Ross v. Meek*, 9 Pickle, 666, viz.: "Upon a *pro confesso* the allegations of the bill may be sufficient to warrant the rendition of a decree without more, as, when the action is based upon a note, or when they are sufficiently definite to fix not only the ground of the defendant's liability, but also the amount. If, however, the allegations are not sufficiently definite to fix the amount of liability, and proof or an account is necessary for that purpose, then the case stands for trial at the next term after the *pro confesso* is taken." See, also, *Haralson v. McGavock*, 10 Lea, 719.

The bill alleges that the transfer made by Wallace to Polk in 1891 consisted of a large number of drays, mules, and harness, worth about three or four thousand dollars. It is also stated that in 1894 Polk conveyed said property to War-

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wick for the sum of \$2,000. The bill then states that Warwick, in about twelve months, conveyed the property to W. B. Gates, and that after a season Gates made a transfer of the mules, drays, and harness to defendant Williamson, and that Williamson, in December, 1897, transferred and conveyed the mules, harness and drays to Post. We think the allegation in the bill that the property was worth between three and four thousand dollars was sufficient. The decree was for only one third of this amount. The *pro confesso* operated as an admission of the allegations of the bill and that this valuation was correct.

The second assignment is, viz.: The decree of the Chancellor was erroneous in adjudging any liability at all against petitioner, for the reason that the bill charged a fraudulent conveyance and scheme entered into with defendant Lymus Wallace to defeat the creditors of the latter. The proposition presented by the bill involves the element of fraud on the part of the debtor, Lymus Wallace, and the participation therein by this defendant. Wallace, who was called upon to answer under oath, directly and positively denied the commission of the fraud. The sworn answer of Wallace was evidence in favor of his co-defendants.

It was an indispensable condition of complainant's right to a decree in this case that he should establish fraud on the part of Wallace. It

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is insisted, however, by complainant's counsel that, with an acknowledgment of indebtedness by Wallace and a *pro confesso* against the fraudulent grantee, Post, and an admission of all allegations against him, complainant was legally entitled to a decree.

We do not think so. We are of opinion that the answer of Wallace under oath, denying all the allegations of fraud, inured to the benefit of Post and was evidence in the cause.

It is insisted by counsel for appellee that this case does not fall within the class of cases in which the answer of one defendant inures to the benefit of another. Counsel cite the case of *Simpson v. Moore*, 5 Lea, 372, viz.: "In that case there was a bill filed to enforce a lien for unpaid purchase money of a tract of land. It alleges a sale by Carter to Moore, Redenhour, and Wells. Certain facts were alleged against Moore, Wells, and Maloney (who took Redenhour's place in the purchase), whereby they were sought to be made liable upon certain representations they were alleged to have made, whereby the complainant was led to purchase the note, and that these admissions estopped them from denying the existence of a lien on the land or setting up a defective title as defense.

"Two of the defendants answer and make successful defense, while a *pro confesso* was taken against Maloney.

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“Maloney took the case to the Supreme Court by writ of error, and made the same insistence as is here and now made for Post, to wit, that ‘the defense of one co-defendant will inure to the benefit of all when such defense disproves the equity against all the defendants.’ ”

The Court held that the defense made by Moore and Redenhour (who became Wells’ administrator) did not help Maloney, using the following language:

“But in this case Moore and Redenhour answered and denied the allegations of the bill, and this Court was of opinion that the evidence did not sustain the charges made against them. But Maloney stands as if every charge made was established by proof, and we are bound so to regard the case. Their defenses, therefore, although the same, are personal to each, and Moore and Redenhour are discharged from liability, because the case made in the bill against them is not made out by proof. Maloney is charged, because in legal effect he admits the allegations of the bill, and is thereby estopped to deny his liability.” *Simpson v. Moore*, supra, 376, 377.

We think the case at bar is easily distinguishable from the case cited. This is a joint suit against the fraudulent grantor and fraudulent grantee. It is a legal solecism to speak of a fraudulent grantee without a fraudulent grantor. There may be a fraudulent grantor without a fraudulent

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grantee, but the converse of this proposition is not true. If there was no fraud on the part of the grantor, how can there be fraud on the part of the grantee?

In order to obtain a decree against Post, it must be shown that Wallace was guilty of fraud which was participated in by Post. The relation they bear to each other in such a transaction is indissoluble. The answer of Wallace is responsive to the bill, and denies all its material allegations. It is both a pleading and a deposition, the oath not having been expressly waived. The early case of *Glason v. Morris*, 10 Johnson (N. Y.), 525, announces the rule, viz.: "That when a bill in chancery is filed against two defendants jointly interested, and the bill is taken for confessed against one of them for want of appearance, and the other appears and disproves the plaintiff's case, the bill will be dismissed as to both defendants."

In the case of *McDaniel v. Goodall*, 2 Cold., 395, the Court said: "It is a well-settled principle of this Court, if a joint defendant answer a bill and remove the equity set up against himself and the other defendant, who does not answer, no decree can be rendered against the defendant failing to answer." Citing *Cherry v. Clements*, 10 Hum., 552; *Hennessee v. Ford*, 8 Hum., 500. In the 8 Hum. case, Judge Green says:

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"But it is said that the bill has been taken for confessed as to Little, and the complainant is entitled to a decree against him, although he may be repelled as to the other defendants who have answered. We think that when a joint defendant answers a bill, and by proof removes the matter of equity set up against him and the other defendants who do not answer, there can be no decree against the defendant so failing to answer." Citing *Glason v. Morris*, 10 Johnson, 525. In *Petty v. Hannum*, 2 Hum., 102, Judge Turley announces the same rule, and cites in support of the statement *Glason v. Morris*.

It was held in *Caldwell & Hays v. McFarland*, 11 Lea, 467: "Where some of the parties did not answer in the case, and had orders *pro professo* taken against them, others answered, however, and the case made by the record clearly removes all equity set up by Caldwell and Hays, and all being tenants in common of the land, there being shown, beyond doubt, no existing right whatever in the bill of Caldwell and Hays, we think it a proper case for the application of the rule that where two defendants are jointly interested or joint defendants answer and meet all the equities of the bill, and this is sustained by the proof, no decree should be entered against those not answering."

The case of *Smith v. Cunningham*, 2 Tenn. Ch., 573, contains a full discussion of the ques-

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tion. The Tennessee cases upon this question are: *Petty v. Hannum*, 2 Hum., 102; *Hennessee v. Ford*, 8 Hum., 500; *Cherry v. Clements*, 10 Hum., 552; *McDaniel v. Goodall*, 2 Cold., 395; *Caldwell & Hays v. McFarland*, 11 Lea, 467; *Phillips v. Hollister*, 2 Cold., 271; *Butler v. Kinzie*, 6 Pickle, 31; *Smith v. Cunningham*, 2 Tenn. Ch., 573.

Without pursuing the subject further, we are of opinion the decree of the Chancellor is erroneous. It is therefore reversed and the complainant's bill is dismissed as to defendant Post, with costs.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE,

FOR THE

EASTERN DIVISION.

KNOXVILLE, SEPTEMBER TERM, 1900.

McANDREWS v. HAMILTON COUNTY.

(*Knoxville.* September 22, 1900.)

COUNTY. *Liability for its employee's negligence.*

A county is not liable for injury caused by the negligent discharge of duty by one of its employees engaged in the service of one of its public institutions—*e. g.*, a house of correction and reformation for the young—although the statute that authorized did not make compulsory, but left optional with the county, the establishment and maintenance of such institution, and regardless of the fact that the institution may yield an income that supports it, or may yield more or less than that, or nothing at all.

Code construed: § 496 (S.); § 462 (M. & V.); § 404 (T. & S.).

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Cases cited: *Wood v. Tipton County*, 7 Bax. 112; *Grant v. Lindsay*, 11 Heis., 651; *Railroad v. Wilson County*, 89 Tenn., 604; *Turnpike Co. v. Davidson County*, 14 Lea, 74; *Hawkins v. Justices*, 12 Lea, 356.

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

JOHN ALEXANDER CAMPBELL for McAndrews.

JOHN H. EARLY for Hamilton County.

WILKES, J. This is an action for damages for personal injuries.

One J. C. Kalleen was joined in the summons, but does not appear to have been served with process or further proceeded against.

The declaration having been filed, was demurred to; the demurrer was sustained and the suit dismissed, and the plaintiff has appealed to this Court and assigns as error the action of the Court in sustaining the demurrer. The declaration sets out the cause of action in substantially the following language:

That the county of Hamilton is a corporation and has established at a place called Jersey, within its limits, an institution for the reformation, cor-

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rection, employment, and instruction of incorrigible youths of both sexes, and that in the proper conduct and management of this institution it became the owner of a buggy and a mule; that on the 9th of September, 1899, this mule was hitched to the buggy, and was carelessly tied to a post of the porch of a storehouse at a dummy railroad station on Sherman Heights; that when the dummy train steamed up to the station, as it usually did and as the defendant might anticipate that it would, the mule took fright, broke the bridle and left the premises, carrying the buggy with him, rushed with great violence and speed up Glass street, without any driver or bridle, until he ran over the plaintiff, threw him to the ground and broke the bones of his left foot, from which he suffered great agony and was made a cripple for life; that the wrong consisted in gross carelessness and negligence in the conduct and use of the mule and buggy for the purposes indicated; and for the injury done he asks damages in the sum of \$2,500.

The county in its demurrer says it was performing a public duty and exercising a part of the sovereign power of the State, imposed on it by statute in operating this institution, and is not liable for the tortious act of its servants in carrying on the institution for the laudable purpose mentioned.

In the argument of counsel for the plaintiff,

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it is insisted that the county cannot shield itself behind the plea of State sovereignty delegated to it.

It is further said that while Hamilton County does not lack anything but a great seal to make it a State, still the house of correction is a county institution which it chooses, but is not compelled by law, to maintain, and hence a plea that it is exercising a duty or function of State sovereignty cannot be interposed as a defense to the torts of those in charge of it. Exactly what functions a mule has to perform in a reformatory institution is not stated. Whether he was used as an example or as a warning does not appear. The declaration, however, concedes that the mule and wagon were necessary to the operation of the institution and were used for its purposes, and the negligence alleged is in tying the mule, when it might be anticipated and expected it would become frightened and break loose. Under the declaration and demurrer the case is made to rest upon the general liability of the county for the negligence of its employees in the conduct of one of its public institutions authorized by statute, but optional with the county whether it would or would not establish it.

The county is authorized, in its discretion, to establish such an institution by an Act of the General Assembly, the object being to reform as well as confine and punish youthful offenders against the laws of the State.

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It is in a certain sense a penal institution, being a substitute for a jail or penitentiary, its scheme being to not only punish but at the same time to discipline and reform the young of both sexes who have committed small offenses or are likely to become outcasts in society.

In *Wood v. Tipton County*, 7 Bax., 112, it was held that a county was no more liable to be sued for the neglect of its officers than is the State for the negligence of its officers in the discharge of their public duties.

But in such matters it can do only such acts as may be allowed, that is, authorized by law. Shannon, § 496. It can exercise that portion of the sovereignty of the State communicated to it by the Legislature, and no more. *Grant v. Lindsay*, 11 Heis., 651; *Railway Co. v. Wilson County*, 5 Pick., 604.

Its liability to suit only extends to matters of contract and not to torts or the negligence of its employees. Hence an action for damages will not lie for laying off a public road by the County Court, which was afterwards declared by the Court to be a shun-pike and ordered to be closed. *Turnpike Co. v. Davidson County*, 14 Lea, 74; *Grant v. Lindsay*, 11 Heis., 651; *Hawkins v. Justices*, 12 Lea, 356.

The general rule is that counties are not liable for torts or negligence in the condition, use, and

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management of public institutions. Many reasons are assigned.

1. That there is no fund out of which satisfaction could be had.

2. That it is better that an individual should suffer than that the public should sustain an inconvenience.

3. That it is a subordinate political or governmental division of the State.

4. That its function or action in regard to such institutions are legislative, and that neither the State or county could be sued on such account.

5. That counties are instrumentalities of government and partake of the immunities of States while acting in a governmental capacity.

On the other hand, it has been held that when a county elects to act under a power which the law does not compel it to exercise, but assumes a duty not required, it must answer for all injuries done in the discharge of that power.

We are of opinion this exception to the general rule could only apply where the county was exercising such power in a matter for its peculiar benefit, if such case can arise under our system of government, and does not apply when the county is exercising a function of government, even though it be one that the county, at its option, might leave to the State.

The difference in the cases is illustrated in

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Lloyd v. New York, 5 N. Y., 369 (S. C., 55 Am. Dec., 347); and in *Maximilian v. New York*, 62 N. Y., 164 (S. C., 20 Am. Rep., 469), where Judge Folger says: "One is that kind which arises from the grant of a special power in the exercise of which the municipality is a legal individual. The other is that kind which arises or is implied from the use of political rights under the general law, in the exercise of which it is as a sovereign. . . . When the power is intrusted to it as one of the political divisions of the State and is conferred, not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser or misuser by the public agents."

The general doctrine, with the limitations and exceptions, is fully laid down and illustrated in the case of *Hughes v. The County of Monroe*, 39 L. R. A., 33; *Markcy v. Queen County*, 39 L. R. A., 43; *Board of Comms. v. Allman*, 39 L. R. A., 58; and the notes to these cases.

In *Alleman v. Albany County*, 25 Hum., 551, it was held that a county was not liable to a convict for an injury to him caused by compelling him to approach a circular saw which was in motion and not properly protected and hence dangerous.

As further illustrating the general rule, it was

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held in *Frye v. Albemarle County*, 86 Va., 195 (S. C., 19 Am. State Rep., 579), that a county was not liable in a case where a convict in a chain gang negligently drove a horse and cart against and in collision with the plaintiff's buggy.

Now, in the conduct and management of this institution the county of Hamilton was exercising a function of government delegated to it by the State, and it does not matter if in so doing the institution was made to sustain itself or even yield a revenue. *Curran v. Boston*, 151 Mass., 505 (S. C., 8 L. R. A., 243); *Peoples Society of New York Hospital v. Purdy*, 126 N. Y., 679; *Benton v. Boston Hospital*, 140 Mass., 13 (S. C., 54 Am. Rep., 436); *Downs v. Harper Hospital*, 25 L. R. A., 602; *McDonald v. Mass. Hospital*, 21 Am. Rep., 529.

We are of opinion the county is not liable on the grounds stated. Mr. Kalleen, the superintendent of the institution, is not before the Court, as an officer or individual, not having been served with process.

The judgment is affirmed with costs.

Building & Loan Association v. Patton.

BUILDING & LOAN ASSOCIATION v. PATTON.

(*Knoxville*. September 22, 1900.)

LANDLORD AND TENANT. *Notice to quit.*

Where husband and wife, by virtue of a stipulation in a mortgage of their lands, held by them as tenants by the entirety, become tenants from month to month, of the purchaser at the foreclosure sale, the tenancy cannot be terminated as to the wife, and suit for her dispossession maintained, upon notice to the husband alone.

Case cited: *Cole Mfg. Co v. Collier*, 95 Tenn., 122.

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

E. Y. CHAPIN and E. M. DODSON for Building and Loan Association.

N. H. BURT for Pattons.

WILKES, J. This is an action of unlawful detainer to obtain possession of a certain lot or parcel of land in the city of Chattanooga. It was commenced before a Justice of the Peace. On appeal to the Circuit Court there was a judgment for possession against the husband, but

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it was denied as to the wife, and the association has appealed, and assigned as error that the Court refused to award possession against the wife as well as against the husband.

So much of the facts as are necessary to be mentioned are that this lot was held by Patton and wife under a deed conveying it to them jointly, and they are thus seized of the lot by entireties. They executed a deed of trust upon it to secure money borrowed. This deed of trust contained a clause providing for sale in the event default was made in repayment of the borrowed money, and it further provided that: "From the conveyance of said land under the sale by a delivery of the deed to the purchaser, said John E. Patton and Eliza Patton, and all persons holding under them, shall be and become the tenant or tenants of the purchaser, holding from month to month at a rental of nine dollars per month, payable to such purchaser monthly in advance, commencing with the day of the delivery of said deed; said tenancy to be determined, at the option of said purchaser, upon ten days notice prior to the expiration of any month."

The object and purpose of this provision was to obviate the necessity for an action of ejectment to obtain possession after sale, if the mortgagors should persist in holding it, and to render them tenants of the purchaser and liable to removal by a simple action of unlawful detainer.

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It is virtually conceded that such stipulation is valid and binding and has the effect intended, to render the mortgagors tenants of the purchaser after sale and liable to removal by such action of unlawful detainer.

The building and loan association became the purchaser of the property under a foreclosure sale under the deed of trust, and gave notice to the husband, John E. Patton, as provided in the trust deed, to vacate and deliver possession. It gave no notice to the wife.

We are of the opinion that, under the terms of this deed of trust, the mortgagors, Patton and wife, upon the foreclosure by sale and the delivery of the conveyance, became the tenants of the purchaser, and liable to be evicted from the premises upon the terms set out in the deed of trust—that is, upon ten days' notice, prior to the expiration of any month—but they cannot be evicted by this proceeding upon any other terms than a compliance with said terms and giving the notice stipulated for.

But it is argued that the eviction of the husband being accomplished, that of the wife necessarily follows, otherwise it will result that if the husband remains evicted, and the wife is allowed to remain in possession, it will virtually amount to a separation of the two; that the husband is entitled to the rents and profits, and that when he is deprived of them by being evicted, the

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wife's right is necessarily extinguished also. This might be so as to an estate vested in the husband, but it is not true when the estate is vested jointly and by entireties in both husband and wife. In such case the wife has a distinct interest in the premises co-extensive with that of the husband, and each owns an entirety in the property, and neither owns any specific part or interest in it.

In *Cole Mfg. Co. v. Collier* it was held that the purchaser of the husband's interest in real estate so held, when made under execution sale for the husband's debts, cannot obtain possession of the lands, or their rents and profits, during the joint lives of the husband and wife, or at all, if the wife proves the survivor. 11 Pickle, 122, 123, and cases there cited.

This case is to be, of course, differentiated from the case of *Cole Mfg. Co. v. Collier*, 11 Pickle, 122, inasmuch as that case involved the question of the result of a sale of the husband's interest under execution against him, while this case presents one where both husband and wife have stipulated to yield possession upon the giving of the notice.

We do not consider what will be the effect of the judgment for possession as against the husband under the state of things, nor whether the judgment against him can be sustained in the absence of a similar judgment against the wife.

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He has not appealed, and his rights are not before us for consideration, but we are of opinion that the wife cannot be evicted by this action except upon the terms prescribed in the trust deed, to wit, the giving to her of ten days' notice prior to the expiration of any month.

In the view we have taken of the case, it is useless to consider the other points presented in the assignment of errors and brief and argument of counsel.

The judgment of the Court below is affirmed with costs.

Stockard & Jones v. Morgan.

STOCKARD & JONES v. MORGAN.

(*Knoxville*. September 29, 1900.)

MERCHANDISE BROKERS. *Liability for privilege tax declared.*

The privilege tax laid upon merchandise brokers is one laid upon a distinct occupation exercised within the State, and not upon the business of those who employ or operate through such agency, whether residents or nonresidents, and is not, therefore, obnoxious to the commerce clause of the Federal Constitution, even if the business done by such agency is, in part or even in whole, for nonresidents.

Case cited: 145 U. S., 1.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

PRITCHARD & SIZER and R. P. WOODARD for Stockard & Jones.

Attorney-general PICKLE and R. B. COOKE for Morgan.

SNODGRASS, Ch. J. This cause, and those heard with it, involve three questions: First, Are complainants merchandise brokers within the meaning of the Tennessee revenue law, imposing a tax

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on such brokers? and, second, does the tax apply to them? and, third, if it has such application, is it a valid constitutional statute, and not obnoxious to the interstate commerce clause of the Federal Constitution?

The question of fact we decide affirmatively. We content ourselves on this point with reference to the agreed facts without reciting them, and to the very discriminating application of the law thereto in an almost precisely similar case decided by the Supreme Court of Alabama at its November term, 1895. *Stratford v. City of Montgomery*, 110 Ala., 619.

We hold that the law applies to complainants, and is not unconstitutional.

In the Alabama case cited the Court shows very clearly the distinction that exists between a mere agent of a foreign principal and a merchandise broker whose business is conducted on the line of sales for foreign and to domestic patrons. After drawing this distinction with great force and clearness, the Alabama Court holds that such brokers stand in the same nontaxable relation as do mere agents, and that a privilege tax on the exercise of such a business is a tax on interstate commerce.

We do not think so. The law does not discriminate. The tax is on the privilege of doing such a business in the State without regard to the customers sought or principals represented.

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The thing taxed is the occupation of merchandise brokerage, not the business of those employing, whether they be domestic or foreign principals. The principals secured by the brokers are at their option. The law confines them to neither foreign nor domestic. It authorizes the business in this State, protects it, and reasonably taxes it for such permission and protection.

It gives to such business the right of competition with other privileged occupations, and charges those engaged in it only as it charges others, reasonably and proportionately to the respective advantages of each. To hold otherwise would be to declare that there could be no tax on the occupation of merchandise brokerage unless those employed in it should appear to confine their business done here to representation of special principals.

We think the view here taken in accord with that expressed by this Court in *Ficklen v. Shelby Co. Taxing District*, affirmed by the Supreme Court of the United States, 145 U. S., 1.

The decree of the Chancellor is therefore reversed, and bill dismissed with cost.

Chattanooga Rapid Transit Co. v. Walton.

CHATTANOOGA RAPID TRANSIT CO. v. WALTON.

(*Knoxville*. September 29, 1900.)

1. DECLARATION. *Sufficient averment of negligence.*

A declaration in an action for personal injuries is not bad on demurrer assigning that the allegation of negligence is too vague and indefinite, which avers that defendant "did wrongfully and negligently run one of its engines and cars upon, over, and against the plaintiff." (*Post*, p. 418.)

Cases cited: *Railroad v. Pratt*, 85 Tenn., 9; *Railroad v. Davis*, 104 Tenn., 444.

2. SAME. *Evidence of specific defect admissible under general averment of negligence.*

And it is competent to prove, under such general averment of negligence in one count of the declaration, the specific fact that the brakes of defendant's train were defective or out of repair, even though in other counts other specific acts of negligence may be averred omitting this one. (*Post*, pp. 418, 419, 426.)

Cases cited and distinguished: *Coal Co. v. Daniel*, 100 Tenn., 65; *Fletcher v. Railroad*, 102 Tenn., 1.

3. RAILROADS. *Observance of statutory precautions for prevention of accidents required of dummy lines.*

Dummy lines, whether in or outside of a city, are railroads within the meaning and purview of the statutes requiring the observance by railroads of certain statutory precautions for the prevention of accidents. (*Post*, p. 422.)

Code construed: § 1574 (S.); § 1298 (M. & V.); § 1166 (T. & S.).

Case cited: *Katzenberger v. Lawo*, 90 Tenn., 239.

4. SAME. *Not excused from observance of statutory precautions, when.*

In a case where the statute prescribing the observance by railroads of certain statutory precautions for prevention of accidents in the operation of their trains is applicable, it is essential that the railroad company shall show affirmatively due observance of the required precautions, and the burden is

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upon it to do so. It constitutes no defense, in such case, if proved that the accident and injury would have occurred even if the precautions had been observed. (*Post*, pp. 419-423.)

Cases cited: *Railroad v. Burke*, 6 Cold., 45; *Railroad v. Connor*, 9 Heis., 26; *Hill v. Railroad*, 9 Heis., 827; *Railroad v. Smith*, 9 Heis., 863; *Railroad v. Thomas*, 5 Heis., 266; *Railroad v. Foster*, 88 Tenn., 678; *Railroad v. St. John*, 5 Sneed, 524.

5. SAME. *Contributory negligence constitutes no defense for non-observance of statutory precautions.*

Contributory negligence of the plaintiff constitutes no defense for a railroad company's failure to observe statutory precautions, but goes only in mitigation of damages. (*Post*, p. 420.)

Cases cited: *Railroad v. Burke*, 6 Cold., 45; *Railroad v. Smith*, 6 Heis., 177; *Railroad v. Walker*, 11 Heis., 385; *Simpson v. Railroad*, 5 Lea, 456; *Railroad v. Foster*, 88 Tenn., 675; *Railroad v. Connor*, 2 Bax., 382.

6. SAME. *What constitutes defense for nonobservance of precautions.*

If it is shown by the railroad company that observance of the statutory precautions was, under the circumstances, impossible, this constitutes a good excuse and defense for non-observance of same, provided it is clear that such impossibility does not arise out of any default of the railroad company. (*Post*, p. 421.)

Cases cited: *Railroad v. Scales*, 2 Lea, 688; *Railroad v. Swaney*, 5 Lea, 119; *Railroad v. Foster*, 88 Tenn., 680; *Railroad v. Anthony*, 1 Lea, 516; *Railroad v. Selcer*, 7 Lea, 559; *Hill v. Railroad*, 9 Heis., 827.

7. SAME. *Burden of proof on railroad company.*

The burden is upon the railroad company to show due observance of statutory precautions, or that such observance was impossible, and that it was guilty of no negligence in providing effectual means for prevention of accidents, and that the accident was unavoidable. (*Post*, pp. 421-425.)

Code construed: § 1576 (S.); § 1300 (M. & V.); § 1168 (T. & S.).

Cases cited: *Railroad v. Gardner*, 1 Lea, 690; *Horne v. Railroad*, 1 Cold., 74; *Railroad v. Fugett*, 3 Cold., 404; *Burke v. Railroad*, 7 Heis., 462; *Railroad v. Connor*, 9 Heis., 21; *Railroad v. Mitchell*, 11 Heis., 400; *Dillard Bros. v. Railroad*, 2 Lea, 296

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Railroad v. Stewart, 13 Lea, 432; Railroad v. Pratt, 85 Tenn., 9; Railroad v. Parker, 12 Heis., 50; Summers v. Railroad, 7 Lea, 204; Railroad v. Smith, 6 Heis., 177; Railroad v. Nowlin, 1 Lea, 525; Railroad v. Stone, 7 Heis., 471; Railroad v. Logue, 13 Lea, 35; Railroad v. Smith, 9 Heis., 864; Simpson v. Railroad, 5 Lea, 456.

8. **SAME.** *Liable though it may not be shown that injury resulted from nonobservance of precautions.*

It is not essential that it shall appear that plaintiff's injury was the result of defendant's failure to comply with statutory precautions to entitle him to recover. It is sufficient if, at time of the accident, the train of defendant was running without compliance with all statutory precautions. (*Post*, p. 426.)

9. **CHARGE OF COURT.** *As to common law negligence, proper, when.*

It is proper for the Court to charge upon the subject of common law negligence as well as upon statutory negligence, where both are charged in separate counts of the declaration and there is evidence tending to prove each. (*Post*, pp. 427, 428.)

Case cited and distinguished: Railroad v. Howard, 90 Tenn., 144.

10. **VERDICT.** *Supported by evidence, when.*

The facts set out in the opinion are held to support a verdict for plaintiff for \$1,200. (*Post*, pp. 429, 430.)

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

PRITCHARD & SIZER for Rapid Transit Co.

W. T. MURRAY for Walton.

WILKES, J. This is an action for damages for personal injuries. There was a trial before the

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Court and a jury, and a verdict and judgment for \$1,200 and costs, and the transit company has appealed and assigned errors.

It is said the Court should have sustained the demurrer to the first count in the declaration, which is in substance that it does not specify any facts or circumstances as the cause of the injury, and is too vague and indefinite to support an action or apprise defendant of the ground of complaint. The allegation in this count is that defendant "did wrongfully and negligently run one of its engines and cars upon, over, and against the plaintiff."

The Court has heretofore held, in the case of *Railroad v. Davis*, 104 Tenn., 444, that such allegation is a sufficient statement of a cause of action.

See, also, *E. Tenn. Co. v. Pratt*, 1 Pickle, 9, where the declaration was similar to this, and was treated as good, though no question was made upon its sufficiency.

It is next assigned as error that there is no specific averment in the declaration that the brake on the train was in defective condition and out of order, and in the absence of such averment evidence of such fact is inadmissible. It is true an action cannot generally be maintained by evidence of acts of negligence which are not averred in the declaration, or upon evidence of a specific act different from that alleged in the declaration, as was held in *Coal Co. v. Daniel*, 100 Tenn.,

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65; *Fletcher v. The Railroad*, 102 Tenn., 1; but we think these authorities are not controlling in cases like the present. Here there is an allegation in the first count that the railroad negligently ran its train over the plaintiff, and this, in the opinion of the Court, is sufficient to let in evidence of any statutory negligence of which the road may have been guilty in so running over him. *E. Tenn. Co. v. Pratt*, 1 Pickle, 9.

The statute provides for the sounding of a whistle or bell at every public designated crossing; that an engineer, fireman, or some other person shall be on the locomotive, and always on the lookout ahead, and when any person, animal, or obstruction appears upon the track, the alarm whistle shall be sounded, the brakes put down, and every possible means used to stop the train and prevent an accident. Shannon, § 1574, Subsecs. 1, 2, 3, and 4.

It is further provided that every railroad company that fails to observe these precautions (meaning all of these, *Railroad v. Gardner*, 1 Lea, 690, 691) shall be responsible for all damages to person or property occasioned by or resulting from any accident or collision that may occur. Shannon, § 1575. And if the precautions are observed, it shall not be liable. § 1576. And the proof that it has observed these precautions shall be upon the company. § 1576. And by § 1577 it is further provided that, even in cases of kill-

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ing stock or injuring same, the burden of proof that it was unavoidable shall be on the company.

In construing these provisions it has been heretofore held by this Court, in an unbroken line of decisions, that the railroad company is liable unless it can show that these provisions and precautions have been observed, and the fact that the accident or collision would have occurred, had the requirements been performed, will not relieve the company from their performance nor from liability for damages.

It has been said that cases of hardship, or even absurdity, may occur under such construction, but the language is explicit and certain, and capable of being given no other meaning. *L. & N. R. R. v. Burke*, 6 Cold., 45-50; *L. & N. R. R. v. Connor*, 9 Heis., 26; *Hill v. L. & N. R. R. Co.*, 9 Heis., 827; *M. & C. R. R. v. Smith*, 9 Heis., 863, 864; *N. & C. R. R. v. Thomas*, 5 Heis., 266; *Railway Cos. v. Foster*, 4 Pickle, 678.

So strict is the rule that contributory negligence will not excuse their observance, be it ever so gross, but will only go in mitigation of damages. *L. & N. R. R. v. Burke*, 6 Cold., 45-51; *N. & C. R. R. v. Smith*, 6 Heis., 177; *Railroad v. Walker*, 11 Heis., 385; *Simpson v. Railroad*, 5 Lea, 456; *Railway Cos. v. Foster*, 4 Pickle, 675-680; *L. & N. R. R. Co. v. Connor*, 2 Bax., 382.

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It is true that impossibilities are not required, and if all is done that should have been done, and the accident was unavoidable, the road will not be liable. *Railroad v. Scales*, 2 Lea, 688, 691, 694; *E. T. & V. A. R. R. v. Swaney*, 5 Lea, 119; *Railway Cos. v. Foster*, 4 Pickle, 680.

But when the impossibility and unavoidableness arise out of the default of the road, the road will still be liable. *Nash. & Chatt. Ry. v. Anthony*, 1 Lea, 516; *Railway v. Selcer*, 7 Lea, 559.

The plea or defense that all efforts would have been ineffectual, will not protect the road; the injunction of the law is peremptory, and the consequence of a failure is unconditional liability for damage done in cases coming within the statute. *E. T. & Ga. R. R. v. St. John*, 5 Sneed, 524-530.

And speculation as to the effect will not be indulged by the Court nor permitted by the road, but the statute demands absolute obedience whether the precautions seem necessary or not. *Hill v. L. & N. R. R.*, 9 Heis., 827; *Railway Cos. v. Foster*, 4 Pick., 679.

This Court has said, in substance, that it is the duty of all who are engaged in running the train, in whatever department they may be employed, to give the entire energies of their bodies and minds, and to bring into requisition all means at their command, to stop the train as soon as

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possible and prevent the accident. *L. & N. R. R. Co. v. Connor*, 9 Heis., 22.

And that the road must be able to show not only that the specific precautions were observed, but, in addition, that all possible means were employed to stop the train and prevent the accident; but the company will not be required to perform impossibilities. *M. & C. R. R. Co. v. Smith*, 9 Heis., 863; *Railroad Co. v. Scales*, 2 Lea, 688.

It is incumbent on the road to show that all the brakes were put down by the express terms of the statute. *M. & C. R. R. Co. v. Smith*, 9 Heis., 864; and this rule applies to dummy lines, such as that operated by appellant, whether in or out of the city. *Katzenberger v. Lawo*, 6 Pick., 239.

As to the burden of proof being upon the railroad, the statute is very plain and emphatic. It says: "The proof that it has observed said precautions shall be upon the company. Shannon, § 1576. And this means all the precautions enumerated in the statute. *Railroad v. Gardner*, 1 Lea, 690.

This is no new rule. It has been uniformly held that when either stock or persons are killed or injured on the track of a railroad, where the statutory precautions must be observed, the burden of proof is upon the company to show that they were observed, and that it was guilty of no negligence, and that the accident was unavoidable;

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and this is not a new rule, but the announcement of a common law principle. *Horne v. Mem. & Ohio R. R.*, 1 Cold., 74; *N. & C. Ry. Co. v. Fugett*, 3 Cold., 404; *Burke v. L. & N. R. R. Co.*, 7 Heis., 462; *L. & N. R. R. Co. v. Connor*, 9 Heis., 21; *Railroad v. Mitchell*, 11 Heis., 400; *Dillard Bros. v. L. & N. R. R.*, 2 Lea, 296; *Railroad Co. v. Stewart*, 13 Lea, 432; *Railroad Co. v. Pratt*, 1 Pick., 9.

It is only incumbent on the plaintiff to prove the injury by collision in the first instance, and when this is done the statute throws upon the company the burden of excusing itself, which it can do only by showing a compliance with the statutory precautions, and when this is attempted the plaintiff may show otherwise, and also rebut the testimony of defendant company as to the accident itself. *L. & N. R. R. Co. v. Parker*, 12 Heis., 50.

When the killing or injury is proved, in order that the company may show a compliance with the statute and remove the presumption of negligence, the onus and necessity is upon it to show that it had the means to be thus employed; in other words, that it not only did what the statute requires as to sounding the bell or whistle, and having some person on the lookout ahead, but that its road, its machinery and equipments, are according to the present state of the art, or in reasonable conformity thereto. *L. & N. R. R.*

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Co. v. Connor, 9 Heis., 22; *Summers v. The Railroad*, 7 Lea, 204; *Railroad v. Stewart*, 13 Lea, 426.

To illustrate: It has been held that the lookout ahead must have good eyesight, and must occupy a position to enable him to see ahead to the best advantage. If it is night time, the engine must be supplied with the best headlight the state of the art affords. *N. & C. R. R. Co. v. Smith, Adm'r.*, 6 Heis., 177; *N. & C. R. R. v. Nowlin*, 1 Lea, 525; *L. & N. R. R. v. Stone*, 7 Heis., 471; *Mcm. City Ry. Co. v. Logue*, 13 Lea, 35. And it must be shown that the brakes were put down. *M. & C. R. R. v. Smith*, 9 Heis., 864.

So when a house is burned by sparks it is incumbent on the road to show that the engine and fire apparatus was properly constructed and in good condition. *Simpson v. The Railroad*, 5 Lea, 456; *Railroad v. Stewart*, 13 Lea, 437.

A cogent reason for holding that a general allegation of negligent injury is sufficient to let in proof of statutory negligence, is that the plaintiff cannot be presumed to know, or required to find out, the exact or specific cause of the negligence of the road, nor in what particular it consisted, whether the machinery was defective or the employee was careless, or in what feature the negligence consisted; while the railroad must, from the

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very nature of the case, have the information and means of showing that its machinery was in proper condition, and that it did all it could to stop the train and prevent the accident.

While this is the rule as to the burden of the proof, and the necessity of the road to show its machinery, roadbed, and equipment in proper condition, we do not understand or mean to say that it is incumbent on the company to take up every part and parcel of its train, item by item, and in all its details, and show them all to be in proper condition and up to the art, and that in the first instance a general statement made by a competent party that the machinery and equipment and roadbed was in proper condition may not be sufficient if unchallenged. Still, that does not preclude the plaintiff from challenging the correctness of the statements as to any of the items, and when so challenged it is the duty of the road, and the onus is on it, to show all that the statute requires.

Nor are we called upon to state all that is embraced in the requirement that "every possible means shall be employed to stop the train and prevent an accident." This requirement must be read and construed in view of the facts, circumstances, and surroundings of each particular case.

Here, the specific objection is not that the onus or burden of proof was placed on the road to

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show its machinery in proper order, but that any proof was allowed to be introduced by the plaintiff to show defect in the brakes or other apparatus.

Under the first count, charging negligence generally, it was clearly competent to show such negligence as a defective brake, even though in other counts of the declaration other specific acts of negligence may have been enumerated, and that may have been omitted. There can be no doubt but that under the statute it is one of its requirements that the brakes shall be put down, and it would be but a mockery to hold that it must be shown that the brakes were put down, but could not be shown that they were in defective condition or entirely missing. The statute clearly requires not only that the train be fully and properly equipped with proper machinery, including specially brakes, but also that the company show that they are in proper condition, and promptly and properly applied, and all these things it is incumbent on the road to show in order to establish a compliance with the statute.

It was not error in this connection to charge that if the brakes and other apparatus were defective, or the road failed to observe any other statutory requirement, its liability would be absolute, even though the plaintiff might not be able to show that the accident or injury was caused by the specific defect or default proven.

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It is said that it was error in the Court to give any charge upon the neglect of common law negligence, because there was no evidence in the case to call for it, and the case of *Railroad v. Howard*, 90 Tenn., 144, is cited as in point. The Howard case holds, in substance, that when the ground of liability is clearly made out upon grounds of statutory negligence, then it is improper and confusing to the jury to give any charge upon the subject of common law negligence. In that case there was an absence of evidence of common law negligence, so that the charge was uncalled for. But there may be statutory and common law negligence at the same time and in the same instance, and the third count of this declaration alleges common law negligence, so that evidence upon that feature was admissible. A charge upon this feature was proper, as there was evidence tending to show that there were obstructions to the view along the line of the road to within a short distance of this crossing, and that the train was being driven at a high rate of speed. Upon this latter point there is a conflict of statement, but the conflict is more apparent than real, as the facts stated in regard to the distance to be traversed by the train within a given time, and the number of stops to be made in that time, show that the speed of the train was about forty-five miles an hour.

The question we are now considering is not

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whether the rate of speed was in fact reckless, but, Is there evidence which would justify the Court in submitting the question of common law negligence to the jury? If so, the jury must look to all the circumstances, the situation of the parties, the topography of the premises, the obstructions near the track, and from all these and other circumstances determine the question whether the road exercised the proper care and caution in running the train at the time and place of the accident.

It is said there is no evidence to support the verdict. We think there is evidence from which the jury would have been warranted in finding that the brakes upon the train were defective, and some evidence that a stop might have been made before the injury occurred if they had been in proper condition. The testimony as to the condition of the brakes is meager, and though it is made by the employees of the road on cross-examination, it is not so satisfactory as to good condition as to convince the jury that there were no defects. It appears that the plaintiff was driving his milk wagon up to this crossing, and that when within about fifteen feet of it he checked his team—some of the witnesses say stopped—and looked in the direction from which the train was coming, and saw no train, and only heard the alarm whistle at the time he was upon the track. The jury, from the proof, might reasonably have

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inferred that the engineer could have seen the plaintiff earlier than he did, or could have sounded the alarm whistle more promptly. The team was entirely across the track, and only the wagon was upon it when the collision occurred. It appears that the train ran 300 feet after the collision before it was stopped, while the engineer states that running at the proper rate of speed it ought to have been stopped in 200 feet. It appears that when the accident occurred the conductor ran to the platform and attempted to apply the hand brake. Now, while this shows diligence on his part, on the other hand the jury may reasonably have inferred from it that he knew the air brakes were defective, as the hand brake was of no importance when the air brake was in proper order.

It is said the verdict and judgment are excessive. The plaintiff, it is evident, received a very violent blow; he was knocked more than 100 feet by an engine going at a high rate of speed; he was rendered unconscious for some time, suffered quite a cut upon his head, his nose was mashed, and he was bruised and the skin broken in many places. One side of his face appears to be paralyzed, as the result of the accident. He was confined to his bed for some three months, and the actual expenses for services, medical and otherwise, was about \$200. He says that he feels that he is permanently injured and unfit for labor. It appears that he was a robust and

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healthy man before the accident, but afterwards was weak and unable to work.

In this connection it is said that he was guilty of contributory negligence which should have abated his recovery. Whether the jury did abate anything upon this view of the case we cannot know. The evidence is conflicting as to how far the plaintiff could have seen the approaching train. Some experiments were made by other persons to determine this question after the accident, but they led to no very satisfactory results.

Upon a review of the whole case we think there is no error in the record, and the judgment of the Court below is affirmed with costs.

Alexander v. Henderson.

ALEXANDER v. HENDERSON.

(*Knoxville*. October 4, 1900.)

1. TAXATION. *Void levy for taxes by a deputy collector.*

A deputy collector's levy for taxes is void, which is made, not by virtue of a certified list from the Trustee, as required by statute, but under a mere memorandum from the Trustee of the amount of taxes due, which is not, and does not purport to be, a writ, execution, warrant, or other instrument known to the law, and does not command anything to be done.

Act construed: Acts 1895, Ch. 120.

2. INJUNCTION. *Against void process for collection of taxes.*

Injunction lies against void process for the collection of State and county taxes, although there may be also a remedy at law by certiorari.

Cases cited: *Bank v. Mayor*, 8 Heis., 816; *Governor v. Montgomery*, 2 Swan, 617; *Spears v. Loague*, 6 Cold., 420; *Mayor v. Pearl*, 11 Hum., 249; *Bright v. Halloman*, 7 Lea, 309.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

ROBT. P. WOODARD for Alexander.

Attorney-general PICKLE and J. H. EARLY for
Henderson.

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McALISTER, J. Complainant filed this bill to enjoin the County Trustee and his deputy from collecting taxes assessed against complainant's personality for the years 1896 and 1897 for State, county, and school purposes, amounting to \$583.50. Defendants, for the satisfaction of these taxes, had levied on one wardrobe and contents, and one leather rocker, as the property of complainant. It is charged in the bill that defendant, Henderson, had levied on this property, and was threatening to levy on other property of the complainant under a paper which is not a writ, command, warrant, or authority, but a mere memorandum delivered to said deputy by defendant Huffaker, the County Trustee. Another ground of the relief asked is, that there is no sufficient description of the property assessed for taxation, and, further, that the assessment is excessive. A demurrer was interposed by defendants, assigning for cause (1) that the State and county were necessary parties; (2) that complainant's remedy was before the County Board of Equalization; (3) that State taxes are forbidden to be enjoined by statute.

The Chancellor overruled the demurrer, and thereupon the defendants filed an answer denying all the material allegations of the bill.

The cause was heard on bill, answer, and exhibits, upon consideration whereof the Chancellor decreed in favor of complainant, and the injunc-

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tion against the collection of said taxes was made perpetual. Defendants appealed, and have assigned errors.

It is insisted, first, that the allegations of the bill in respect of the want of authority of the deputy are denied by the answer and not sustained by the evidence.

On this subject the bill alleged that the only paper under the authority of which the deputy seized complainant's property, and proposes to sell the same, is not a writ, execution, warrant, or other instrument known to the law; that it does not purport to be issued by any official whatever, or to any one, and commands nothing whatever to be done. In short, it is alleged that said paper is nothing but a "memorandum," and purports only to be such. The memorandum in question, under which the deputy made the levy, or a copy thereof, is exhibited with the bill. It is evidently a copy of such a notice as the County Trustee sends out to the tax-debtor, advising him of the amount of his taxes, and in general terms the nature of the property against which the tax is assessed, the time of maturity of the taxes, and such other information as a taxpayer might wish to know. The Act of 1895, Chap. 120, Sec. 72, provides that the County Trustee shall make out and deliver to a deputy a certified list of all delinquent taxes due in said constable's or deputy's district, containing a description of the

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property as appears on the tax books. These lists shall have the force and effect of executions from a Court of Record, and shall be authority for the officer to whom issued to collect the unpaid taxes therein specified, the commissions and costs, and to levy upon and distrain and sell personal property anywhere in his county, etc.

The defendant, Henderson, in his answer admits that at the time he made the levy on complainant's property, he had the paper or memorandum described in the bill. He avers, however, that the delinquent tax books for Hamilton County had been made out and certified for the years 1896 and 1897, on which the amount of taxes due by the complainant for those respective years duly appears. It is further averred in the answer that these certified delinquent tax books, with a description of the property, as it appeared on the tax books for these years was at the command of defendant, Henderson (the deputy), but he used the instrument (the memorandum in question) as a matter of convenience.

It will be observed that the answer does not aver that the certified delinquent list had been delivered by the County Trustee to Henderson, but simply that it was at his command. The deputy does not claim to have used the certified delinquent list in making this levy, but he admits he used the memorandum in question. It is the certified delinquent list which the statute declares

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shall have the force and office of an execution from a Court of Record, and not any private paper or memorandum which the officer may choose to use for his own convenience.

As was said by this Court in *Bright v. Halloman*, 7 Lea, 309, tax books are process equivalent to an execution in the hands of an officer, and a payment under protest entitled the party to sue for so much as is illegal. The levy made on complainant's property was void for want of any legal process conferring authority upon the officer. It is said the complainant has mistaken his remedy, but should have proceeded by certiorari in a Court of Law. The writ of certiorari does afford a proper remedy against a distress warrant illegally issued to collect taxes. *Spears v. Loague*, 6 Cold., 420; *Mayor v. Pearl*, 11 Hum., 249. But there is a concurrent remedy by injunction in a Court of Equity to enjoin void process. *Nat. Bank v. Mayor and Aldermen*, 8 Heis., 816; *Governor v. Montgomery*, 2 Swan, 617.

The Chancellor's decree is affirmed to the extent that it perpetually enjoins the sale of complainant's property under the levy in question.

Knoxville v. Harth and Knoxville v. Galbraith.

KNOXVILLE v. HARTH,

AND

KNOXVILLE v. GALBRAITH.

(*Knoxville*. October 6, 1900.)

MUNICIPAL CORPORATIONS. *Liability for damages caused by grading streets.*

A municipal corporation that permits a third person to grade its streets is liable for the resulting damages to the ingress and egress of the owners of abutting lots, although such grading was not authorized by any formal or valid action of the city authorities.

Acts construed: Acts 1891, Ch. 31; Acts 1893, Ch. 41.

Code construed: § 1988 (S.).

Cases cited: *City v. Nichol*, 3 Bax., 338; *Memphis v. Lasser*, 9 Hum., 760; *Knoxville v. Bell*, 12 Lea, 159.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. JOSEPH W. SNEED, J.

R. L. CATES for Knoxville.

SANSOM, WELCKER & PARKER for Defendants.

WILKES, J. These are actions against the city by citizens and property owners for damages to

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their property, which abuts on Cleveland street in the city.

It appears that one Lawson Irwin, a contractor, was employed by the trustees of Grey Cemetery to make some improvements on its property, which required the use of a large quantity of earth. He saw Mr. John J. Littleton, chairman, and John Hudiburg, associate member of the Board of Public Works, and from them obtained permission to get the earth from Cleveland street by grading it. The chairman directed the city engineer to establish a grade for the street, and he proceeded to do so, setting stakes for the guidance of Irwin. The city did not employ or pay Irwin for the work, but simply permitted him to get the earth from the street under the guidance of its engineer. The street had not been previously graded, and there was no action of the board directing it to be done nor establishing the grade, and no ordinance passed. The only authority for the work on the street was the permission given by Littleton and Hudiburg as individuals, and not as a board.

Plaintiffs property abutted on this street, and their ingress and egress was seriously injured by the grading, and their property was thereby depreciated materially in value. The trial Judge hearing the case without a jury, gave judgment for plaintiff Harth for \$225, and in favor of plaintiffs Galbraith & Maloney for \$75, and the

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city has appealed. The counsel for the city makes no complaint of the amount awarded, and does not question the fact that damage was done, but the contention is that the work was not done by the city, nor primarily for its benefit; that the work was not authorized to be done by the city, but was done simply by permission of two of the three members of the Board of Public Works as individuals, and not in any board or official capacity, and under this state of facts the city would not be liable.

The charter of the city provides that the Board of Public Works shall have the exclusive power and control over the construction, supervision, cleaning, repairing, grading and improving all streets, alleys, etc., and to fix and establish the grade of all streets, alleys, avenues, and thoroughfares. If this street had been changed from the natural or a previously established grade by a valid act or ordinance of the city, it is conceded that under the Act of 1891, Chapter 31, as amended by the Act of 1893, Chapter 41 (Shannon, § 1988), the city would have been liable for damages to the property of abutting owners, but it is insisted that the changing in this grade was not the act of the city, and it cannot be held liable therefor. On the other hand, it is insisted that the city is liable for such damages, resulting from a change of grade, whether such grading was legally authorized or merely permitted to be done. The

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language of the act is broad enough to cover such grading, no matter by whom done, as the language does not refer to grading done by the city, but in general, and would embrace grading done by any other person. The Courts give a liberal construction to such acts in favor of the citizen when the work is for the benefit of the general public. *City v. Nichol*, 3 Bax., 338.

That this grading was a benefit to the city cannot be questioned, and while the city neither authorized nor ratified the act in any official manner, it did permit the street to be torn up and graded, to the injury of the plaintiffs and for its own benefit. A municipal corporation is the proprietor of its streets, which it holds in trust for the benefit of the corporation. The city must superintend, control, and regulate its streets, and it must so enforce measures of vigilance and care over them as not to cause or allow damage to others by their condition. *Nashville v. Brown*, 9 Heis., 2.

It cannot divest itself of its duty to superintend and control all improvements and repairs made by its agents, servants, and contractors. *Memphis v. Lasser*, 9 Hum., 760; *Knoxville v. Bell*, 12 Lea, 159.

Neither can it turn over to a third person the grading and control of one of its streets and escape responsibility for his act, which it permits and from which it receives benefit. If the city

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permitted this work to be done, and received and used it after it was done, it would be liable on that ground; if it was a tortious act done by the sanction or permission of the corporation, it would be liable on that ground. 2 Dillon on Municipal Corporations, Sec. 710, 4th edition.

We are of opinion there is no error in the judgments of the Court below and they are affirmed with costs.

State, *ex rel.*, v. Cates.

STATE, *ex rel.*, v. CATES.

(Knoxville. October 8, 1900.)

1. JUSTICE OF THE PEACE. *Additional, for districts including county towns.*

That provision of the Constitution that gives an additional justice of the peace to "districts including county towns," and the statute enacted pursuant thereto, do not give an additional justice of the peace to each of several districts, included, in whole or in part, within the county town, but only to that district in which the courthouse is located. (*Post*, pp. 442-446.)

Constitution construed: Art. VI., Sec. 15.

Code construed: § 427 (S.); § 392 (M. & V.); § 339 (T. & S.).

Case cited: State, *ex rel.*, v. Justices, 90 Tenn., 722.

2. ELECTIONS. *Of Justice of the Peace.*

Although the law authorized the election of three justices for a civil district, the candidate receiving the third highest vote in a justice's election for that district is not entitled to the office, where the officers of election prepared ballots for the election of only two justices, and certified the election of only two, and the people voted for only two. (*Post*, pp. 446, 447.)

FROM KNOX.

Appeal in error from Circuit Court of Knox County. JOSEPH W. SNEED, J.

TILLMAN & VANDEVENTER and WEBB & MCCLUNG for Relator.

GREEN & SHIELDS and CHARLES T. CATES for Cates.

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McALISTER, J. The petitioner, C. H. Flournoy, claiming to have been elected a Justice of the Peace for the Twenty-fourth Civil District of Knox County at the August election, 1900, filed this petition for the writ of mandamus to compel the Commissioners of Election to issue to relator a certificate of election. The Twenty-fourth Civil District of Knox County now comprises the tenth ward of the city of Knoxville, and formerly said district and ward composed the municipality of West Knoxville. In 1897 the Legislature abolished the charter of West Knoxville and merged said municipality in the old corporation of Knoxville. Said Act of consolidation provided that the old territory embraced within the former limits of West Knoxville should constitute the tenth ward of the city of Knoxville. Prior to this time, to wit, on the 4th of April, 1887, the County Court of Knox County, pursuant to the powers conferred by the Constitution and statutes of the State, carved out of the Twelfth Civil District of Knox County the Twenty-fourth Civil District, making its metes and bounds commensurate with the limits of the municipality of West Knoxville. It should also be stated that prior to the consolidation Act, and at the present time, the city of Knoxville proper comprised the First Civil District of Knox County. The separate municipality of North Knoxville, which was also merged into the city of Knoxville by said consolidation Act of

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1897, formerly comprehended a part of the Second Civil District of Knox County. The consolidation Act of 1897 did not undertake to affect the status of any of these civil districts, but simply abolished the charters of West Knoxville and North Knoxville, annexing the territory therein and merging the inhabitants thereof into the city of Knoxville, and providing also that the old tenants of West Knoxville should constitute the tenth ward of the city of Knoxville. It appears from the petition that at the general election on August 2, 1900, two Justices of the Peace were to be elected for the Twenty-fourth Civil District of Knox County, and that the voters were instructed by the Commissioners of Registration on the face of the ballots to vote for two Justices of the Peace. At said election the relator, C. H. Flournoy, was a candidate for Justice of the Peace and received 125 votes, while two candidates each received a higher vote, namely: Thomas Rodgers 178, and A. T. Scott 141 votes. Nevertheless the relator claims to have been elected, his insistence being that said Twenty-fourth Civil District was entitled by law to three Justices. The Commissioners decided that said district was only entitled to elect two Justices, and issued certificates of election to Rodgers and Scott, but refused to issue a certificate to relator.

The Constitution, Art. 6, Sec. 15, provides, viz.: "There shall be two Justices of the Peace elected

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in each district by the qualified voters therein, except in districts including county towns, which shall elect three Justices. . . . The Legislature shall have power to provide for the appointment of an additional number of Justices of the Peace in incorporated towns."

The contention of the relator is that the Twenty-fourth Civil District is entitled to three Justices because it includes a part of the city of Knoxville, which is a county town within the meaning of the Constitution. It is insisted that the true interpretation of the Constitution is that any entire district wherein the county town is located, whether in whole or part, is entitled to three Justices of the Peace, and that relator having secured 125 votes, being one of the three who had the highest number of votes cast in said election, was duly and constitutionally elected in and for said district.

The city of Knoxville is not wholly included within any one of the three districts, but is partially in each, and embraces the First Civil District, the Twenty-fourth Civil District, and a part of the Second Civil District of Knox county. It is argued that when two or more civil districts include part of a county town, the Court should follow the evident tendency and spirit of the Constitution to give additional representation in the County Court to districts including incorporated or county towns, and hold that both districts

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are entitled to a third Justice rather than hold that neither of them is so entitled, or rather than hold that one of said districts is and that the other similarly situated is not so entitled.

It may be admitted that the object of allowing an additional Justice in districts including a county town is to increase the facilities for the transaction of business in centers of population, but it is true that unless a district includes a county town it is only entitled to two Justices, regardless of its population. But what is the meaning of the term county town as employed in this clause of the Constitution? We are constrained to hold that it means the county seat, where the courthouse is situated, and that the district including the county town where the courthouse is located is entitled to the additional Justice of the Peace. If this is not so, then every civil district containing a town is entitled to elect three Justices of the Peace. Moreover the number of Justices could be multiplied by the extension of the corporate limits of the municipality into other civil districts of the county. *State, ex rel., v. The New Justices*, 6 Pick., 722. In our opinion the true test of the power of a particular civil district to elect three Justices of the Peace depends upon the question whether the county town is the seat of the county, where its courthouse is located for the transaction of its public business. It will be observed that we do

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not include the county jail, workhouse, or other public building, in making the test of what constitutes the county town, but confine our test to the location of the courthouse.

Article 6 of the Constitution provides that the Legislature shall have power to provide for the appointment of an additional number of Justices of the Peace in incorporated towns. Shannon's Code, § 427, enacted pursuant to this power in the Constitution, provides that for every incorporated town "one Justice of the Peace is to be elected by the qualified voters therein."

It will be observed that this additional Justice is provided for an incorporated town and not for the civil district. We have not intended by anything said in this opinion to question the right of incorporated towns to elect Justices of the Peace under the clause of the Constitution and section of the Code last quoted, but have dealt exclusively with Sec. 15 of the Constitution, authorizing the election of three Justices by civil districts including a county town (where the courthouse is located).

In conclusion, we may add that there is no view of the case in which the relator can rightfully claim to have been elected a Justice of the Peace for the Twenty-fourth Civil District. In the first place there was no election held for three Justices in said district, but the voters were instructed by the Commissioners of Registration,

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by printed notices on the face of the official ballot, to vote for two Justices. The returns and certificates of election show that two of the candidates received the highest number of votes and were declared elected. Again, the relator cannot claim to have been elected for the incorporated city of Knoxville, since he charges in his petition that he was a candidate for Justice of the Peace in the Twenty-fourth civil district, and was voted for by the qualified electors therein and not by the qualified voters of the corporation of Knoxville. The relator attacks the constitutionality of Chap. 323, Acts of 1897, which abolished the charter of the town of West Knoxville, but we have not considered that question, for the reason that relator has no status in this litigation that would authorize such an attack, and we are unable to perceive how the settlement of this question would affect his rights. There was no error in the action of the Circuit Judge in sustaining the demurrer and dismissing the petition.

Affirmed.

Crudgington v. Hogan.

CRUDGINGTON v. HOGAN.

(*Knoxville*. October 13, 1900.)

1. GARNISHMENT. *Fund not subject to.*

A fund is not subject to garnishment by the depositor's creditor, which has been placed in bank, earmarked as a trust fund, and upon which check has been drawn, but not presented before service of garnishment, applying it, in accordance with an antecedent agreement, to the exoneration from liability for the depositor of the surety who signed the note with him to raise the fund.

Cases cited: McGuffey v. Johnson, 9 Lea, 555; Stockard v. Stockard, 7 Hum., 303; Wharton v. Lavender, 14 Lea, 178.

2. SAME. *Same. Parties.*

A surety upon a refunding bond given upon withdrawal of an attached fund during the progress of the cause, is sufficiently before the Court to authorize a decree settling his rights in the fund.

3. SAME. *Same. Same.*

The debtor whose funds are attached, may defend by setting up, in favor of a person not a party to the cause, a superior title derived from himself.

FROM KNOX.

Appeal from Chancery Court of Knox County.
HUGH G. KYLE, J.

GREEN & SHIELDS and A. C. GRIMM for Crudgington.

SANSOM, WEICKER & PARKER for Hogan.

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WILKES, J. This is a garnishment proceeding. Wright obtained a judgment against Hogan for about \$200. Parker became stayor of execution. When the stay expired Hogan borrowed \$247 and executed for it his note with Parker as indorser. It was agreed between Hogan and Parker that enough of the money so borrowed should be used to pay off the judgment on which Parker was bound as stayor. Hogan used \$26.98 of the money for his private purposes, and, not being able to find Wright, deposited \$220.02 in the Third National Bank of Knoxville. This deposit he made in his name as executor and trustee. In the afternoon of the same day he gave Wright a check for \$220.02, the amount of the judgment and costs. This check was not presented by Wright until the next day, and before it was paid or presented and before banking hours the bank was garnished by Crudgington, a judgment creditor of Hogan. When the money was borrowed by Hogan he pledged a note which he held as executor and trustee as collateral for its payment.

The question is whether the funds in the hands of the bank can be held under the garnishment proceeding by complainant Crudgington. The Chancellor held that they could; the Court of Chancery Appeals modified the decree of the Chancellor and held the fund liable only to the extent of \$3.00, dividing the costs between the parties.

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The complainant has appealed and assigned errors. The errors assigned are in holding that the funds in the hands of the bank were impressed with a trust in favor of Parker, and in further holding that the facts as stated made out a case of equitable appropriation of \$220.02 of these funds to the payment of the debt for which it was borrowed. We are of opinion there is no error in the decree of the Court of Chancery Appeals. We leave out of consideration altogether the fact that Hogan, in addition to Parker's indorsement, pledged the note which he held as executor and trustee. The pledge of this note for such a purpose was entirely unauthorized, and no rights could accrue to either Hogan or Parker from its pledge, and it is a matter wholly foreign to the merits of this controversy.

It appears that Parker gave his indorsement upon the note in consideration and upon a previous promise that a sufficiency of the funds raised on it should be applied to the judgment on which he was stayer. After he obtained the money Hogan sought for Wright in order to pay off the judgment, but not finding him he deposited the money, not to his own credit, but to his credit as executor and trustee. Why this was done does not distinctly appear, but it is fair to infer that it was in order to keep the same separate from his own funds or to impress it with some sort of trust, so that it could not be taken

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for his debts. He clearly intended to appropriate so much of it as was necessary to the payment of the judgment, and to effect this gave the check. This was in pursuance of the agreement made with Parker, and to carry that agreement into effect. It is true he used a small amount of the gross sum deposited for his own private purposes and left a surplus of \$3.00 in the bank. For the latter the Court of Chancery Appeals gave judgment and that is not complained of. The amount drawn out for individual accounts is not involved, and these matters are only important to show that, as to this surplus over and above the amount required to pay the judgment, Hogan treated it as his own.

This does not at all militate against the idea that he appropriated and set apart the \$220.02 as a fund to pay off the judgment in pursuance of his agreement with Parker.

The case is practically the same as that of *McGuffey v. Johnson*, 9 Lea, 555. See also *Stockard v. Stockard*, 7 Hum., 303; *Wharton v. Lavender*, 14 Lea, 178-190.

The creditor of Hogan can occupy no higher ground than Hogan himself, and the question of notice is not involved, as the complainant does not assume the attitude of an innocent purchaser or transferee, but of a creditor.

It is said Parker is not before the Court and a trust in his favor cannot therefore be set up. This

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position is not well taken. Parker is surety upon a bond executed in the progress of the cause, conditioned to refund the amount if Hogan is not successful in his suit, he having procured the fund upon a dismissal of the attachment and dissolution of the injunction. *Bottom v. Maddox*, 3 Shannon's Cases, 260.

But, in addition, his rights can be set up and protected by Hogan, who holds the fund under the agreement in trust for Parker's indemnity and benefit. The check was given to Wright and accepted by him before the garnishment proceedings were instituted, and he accepted the same as a payment of his judgment.

We are of opinion that the fund was a trust fund for the payment of the judgment to Wright, so as to save Parker harmless, and the check given to Wright was an equitable appropriation of it according to the agreement and the decree of the Court of Chancery Appeals is affirmed.

Galbraith & Maloney v. Knoxville.

GALBRAITH & MALONEY v. KNOXVILLE.

(Knoxville. October 13, 1900.)

MUNICIPAL CORPORATIONS. *Not liable on bond, when.*

In an action on an alleged city bond, there can be no recovery where *non est factum* and statute of limitations are pleaded, where the bond had been due some fourteen years before institution of suit thereon, and there is no proof of the city's recognition of its existence or promise to pay it during that period by payment of interest thereon, or providing sinking fund for its payment, or otherwise.

FROM KNOX.

Appeal from Chancery Court of Knox County.
R. H. SANSOM, Sp. Ch.

WELCKER & PARKER for Galbraith & Maloney.

T. L. CARTY for Knoxville.

WILKES, J. This is an action upon what purports to be a coupon bond for \$100 of the city of Knoxville, issued in 1855 and maturing 30 years after issuance. Coupons are on the bond from July 1, 1863, to maturity. The bond matured in 1885 and suit was brought May, 1898.

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The defenses interposed are *non est factum* and the statute of limitations. The Chancellor gave decree for the principal of the bond, \$100, and \$12.50 interest, in all \$112.50, and costs, and the city appealed.

The Court of Chancery appeals reversed the Chancellor and dismissed the bill and complainants appealed to this Court and have assigned errors.

These assignments are that the Court of Chancery Appeals erred in sustaining the pleas of *non est factum* and the statute of limitations, and in dismissing the bill.

It was alleged in complainant's bill that the city levied a special tax to create a sinking fund for the payment of this bond, which is described as bond No. 4, and other bonds of similar import and of the same series, and that said sinking fund was to be held by the city to pay off said bond when it became due and that the city thus created a fund which it held as an express trustee for the payment of the bonds.

Upon this feature of the case the answer says: "It is not true, as alleged by the complainant, that it (the defendant) levied a special tax to create a sinking fund to pay said bond No. 4, series of 1855. Nor did it levy a special tax wherewith to pay the interest on said bond of said series. The interest on said bonds was regularly paid without default out of the general revenues of the defendant and the sinking fund

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was likewise created for the purpose of paying said bonds at maturity. It is not true, as alleged by complainants, that the sinking fund is now in the hands of the defendant or that the defendant has held or still holds said sinking fund for the payment of said bond No. 4, series of 1855, either in its own right or as trustee for complainants. The defendant has no sinking fund whatever, and has not had such a sinking fund since 1896. The defendant has no such fund which it holds as trustee or otherwise for the payment of said bond No. 4, or the interest coupons attached thereto."

The Court of Chancery Appeals construed this language to mean that the city created a sinking fund to pay the bonds of this series, except bond No. 4, and that inasmuch as the complainants are relying upon this admission in the answer to establish the fact that there was a sinking fund, they must take the language as they find it, giving it its natural construction, and inasmuch as this statement in the answer is the only ground upon which complainant can base a contention that there was a sinking fund for the benefit of bond No. 4, their contention on this feature is not established. We think the construction placed upon this language by the Court of Chancery Appeals is correct, but whether this be so or not, the establishment of such sinking fund is only material as bearing on the pleas of *non est factum*

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and statute of limitations, upon the idea and theory that the city in this way recognized the validity of the bond and its liability for its payment. But it does not follow, even if it be conceded that a sinking fund was established, that the validity of this particular bond is established. If it be granted that a sinking fund was created to retire all the bonds, including No. 4, it does not follow that the identity of this particular bond as a valid bond, No. 4, is established in the face of the plea of *non est factum*. The fact that a sinking fund was established does not prove the validity or identity of the particular bond sued on.

With this feature of the case eliminated, to wit, the creating and holding of a sinking fund, not being shown, the plea of *non est factum* is good, as there is no proof of its execution by the city, and the plea of the statute of limitations is likewise good, as the bond matured in 1885 and the suit was not brought until 1898, or 13 years after maturity.

We think there is no error in the decree of the Court of Chancery Appeals, and that the same result would follow from the failure to identify this bond sued on as the bond No. 4 issued by the city.

Maples v. Rawlins.

MAPLES v. RAWLINS.

(Knoxville. October 13, 1900.)

1. HOMESTEAD. *Attaches prior to judgment lien.*

Upon the purchase of land by the head of family, against whom there exists, at the time, a judgment in a Court of record, the homestead attaches in his favor and prevails over the lien of the judgment.

2. SAME. *Debtor's purchase of homestead not fraudulent as to his creditors.*

The purchase of homestead by a debtor, with funds furnished by his wife and sons, is not fraudulent as to his creditors.

Cases cited: Hollands v. Webb, 2 Shann. Cas., 582; Dolbey v. Mullens, 3 Hum., 437; Wagner v. Smith, 13 Lea, 569; McCrae v. McCrae, 103 Tenn., 719.

FROM KNOX.

Appeal from Chancery Court of Knox County.
R. H. SANSOM, Sp. Ch.

WEICKER & PARKER for Maples.

GREEN & SPIELDS and A. C. GRIMM for Rawlins.

WILKES, J. The question in this case is one of homestead. Rawlins recovered judgment against Maples June 30, 1898; Maples bought the real

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estate in controversy December 19, 1898. On the same day that he bought it and had it conveyed to himself, but at a later hour, he mortgaged it back to Ward, from whom he got it, to secure him the balance of purchase money. Rawlins had the property levied on, and complainant filed this bill against him and the Sheriff to have his right to homestead declared. The Chancellor decreed that complainant was entitled to a homestead exemption, but that defendant had a right to have the property sold subject to the homestead. Defendant appealed and assigned errors.

Complainant is the head of a family. The insistence of defendant is that his judgment lien, which was in a Court of record, fastened itself upon the property as soon as the title vested in the complainant, and was superior to the homestead right. It is also insisted that the money invested in this homestead was subject to complainant's debts, and could not be invested in a homestead that would be free from such debts.

In *Hollands v. Webb*, 2 Shannon, 582, it was held that property subject to execution could not be converted into a homestead for the purpose and with the intent to defeat creditors of their debts, but that if a debtor had money on hand he might convert it into a homestead. Money in the hands of a debtor is not subject to be seized under execution. If it came to the hands of an officer who has an execution in his hands against

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the owner, it may be applied to such execution. *Dolbey v. Mullens*, 3 Hum., 437.

So if it be in the hands of a third person that person may be garnisheed. In the present case, however, the Court of Chancery Appeals report that the money invested in this land was not that of the debtor, but was furnished by the wife and sons. A creditor cannot complain of the sale and conveyance of personal property not liable to execution in the hands of his debtor. *Wagner v. Smith*, 13 Lea, 569.

There can be no question of fraud in the case under the finding of the Court of Chancery Appeals.

In *McCrae v. McCrae*, 19 Pick., 719, it was held that when a widower with minor children made a will in which he directed that his land be sold for his debts that the homestead right of the minors was superior to that of the creditors provided for in the will, that the right to homestead in the minor children attached immediately on the father's death, and took effect simultaneously with the will, and in such case the Courts, in enforcing the spirit of the Constitution, would give the homestead priority.

A similar principle applies to this case, and the homestead right attached at the same time the lien of judgment did, but is superior to it. The decree of the Court of Chancery Appeals is affirmed.

Transit Co. v. Venable.

TRANSIT CO. v. VENABLE.

*(Knoxville. October 13, 1900.)*1. NEGLIGENCE. *Presumed from injury to passenger by collision.*

From proof of the fact of injury to a passenger by collision of trains, the law, without more, presumes negligence on the part of the carrier. (*Post*, pp. 467, 468.)

2. COMMON CARRIER. *Servant of, treated as passenger, when.*

A servant having nothing to do with operation of trains, but performing service at a station—*e. g.*, that of night watchman and gatekeeper—who is permitted by the carrier to travel to and from his place of service on its trains, without payment of fare, is not a trespasser, but a passenger, while thus on its trains. (*Post*, pp. 468, 469.)

3. SAME. *Same.*

And such servant is not deprived of his character of passenger, and converted into a trespasser, while thus riding on his master's trains, by the fact that he was riding without pass or payment of fare, in violation of a well-known and reasonable rule and regulation of the carrier company, it appearing that he was riding openly in a passenger coach, with the knowledge of the company's servant, in this case a conductor, in charge of the train. Until such servant resists or refuses to comply with the reasonable demand of the company's servant in charge of the train to pay fare or to leave the train, he is not a trespasser, but remains a passenger. (*Post*, pp. 462-467.)

Cases cited: *Washburn v. Railroad*, 3 Head, 638; *Railroad v. Hailey*, 94 Tenn., 383.

4. SAME. *Same.*

The presence of such servant on the train, with the knowledge of the conductor or other person in charge of the train, with-

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out any demand made of him on the occasion to pay fare or leave the train, entitles him to the character of a passenger. (*Post*, p. 467.)

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

PRITCHARD & SIZER for Transit Co.

W. T. MURRAY for Venable.

BEARD, J. The defendant in error, at the time of the injury he complains of in this action, was in the service of the plaintiff in error. His chief duty was that of night watchman at the company's depot in Chattanooga; coupled with this, however, during his watch he was required to stand at the gate which shut off the railroad tracks from the station and examine the tickets of parties seeking, and direct them to, its trains. On account of a slight injury previously received he had laid off from service for a few days. About eight and one-half o'clock of the morning of the day of the accident in question in this case, he boarded one of the trains of the plaintiff in error at a point near his home, a short distance outside of Chattanooga, to ride to the station or depot of his employer, to report his read-

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iness to return to duty the coming night. Just before reaching his destination the train on which he was riding had a head-end collision with a train of the Chattanooga, Rome & Southern Railway Co., which, under a contract with the plaintiff in error had the right to use its tracks at intervals. The injury for which the defendant sues resulted from this collision.

Both companies were defendants in this action, and there was a verdict against both. A new trial was granted the Chattanooga, Rome & Southern Railway Co. and disallowed as to the Chattanooga Rapid Transit Co., and the case is before us on its appeal in error.

The declaration alleged negligence on the part of the two railway companies, but there was no evidence to sustain the averment. The case was rested, by the plaintiff below, on the proof of the accident, the resulting injury and a presumption of negligence arising from the accident.

The chief controversy in the case was as to the status of the defendant in error at the time of the accident, or, rather, as to the relation he then sustained to the plaintiff in error. The insistence of the Rapid Transit Co. was that Venable was an employee of the company riding on one of its trains in full knowledge of the fact that he was violating one of its rules, which forbade any one to ride without the payment of fare or a pass from a superior officer, and in

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doing so he was a trespasser, to whom no duty was owed save not to inflict upon him wanton injury; on the other hand, the contention of the defendant in error was that he was a passenger, entitled to all the protection which the law attaches to the passenger relation.

On this point the testimony of the plaintiff below was that ever since his employment by the company he had ridden on its trains to and from his work without a pass or the payment of fare, and his right to do so had never been questioned by any of the conductors or other officers of the company, and that he had never heard of any rule requiring an employee to exhibit a pass or pay fare in order to ride. On the other hand, the conductor of the train testified there was a rule of the company posted in conspicuous places, by which conductors were forbidden to permit parties to ride without a pass or the payment of fare, save employees of the company going to or returning from their work, and that he had called the attention of Venable to this rule more than once, and had said to him on such occasions that he must either pay his fare or get a pass. He admitted, however, he had never enforced this rule against him or any other employee of the company, and that on the morning of the accident, and a little while before it occurred, he saw Venable on the train, but did not demand fare from him.

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On the point raised by this testimony of the conductor, the trial Judge said to the jury that "if the plaintiff had been notified that he would not be allowed to ride on its train by virtue of his position as an employee of the road and had been notified that he could not ride on its trains without a pass or the payment of fare, and he was undertaking to ride at the time he claims to have been injured, without a pass or the payment of fare, and if there is nothing in the evidence to show he was on the train by the consent or permission of the conductor, he would not be entitled to recover." Again putting his view of the law on this subject, so as to save all misapprehension on the part of the jury, he says: "If the proof shows that the plaintiff was on the defendant's—Rapid Transit Co.'s—train with the knowledge or by the consent of the conductor, then he occupied the position of a stranger, and not that of an employee to the defendant company and it would owe him the same duty that a common carrier owes a passenger for hire. . . . And if he was on the train under that state of facts and the proof shows there was a head-end collision . . . the law would presume that there was negligence on the part of the defendant, the Rapid Transit Co., and your verdict should be for the plaintiff, provided he was injured."

It is insisted that there is error in this charge

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of the Court. A railroad company, beyond question, has the right to make and enforce reasonable rules for the control of its trains and persons thereon, not only to provide for the security of its passengers and employees (*Railroad v. Wilson*, 88 Tenn., 306) but to protect itself from imposition and wrong (1 Ell. on Railroads, Sec. 199), and such rules cannot be abrogated by subordinate employees. 4 Ell. on Railroads, Sec. 1500. In recognition of this unquestioned right upon the part of the company, and the lack of power of the subordinate to wilfully abrogate such a rule, in *Railroad v. Hailey*, 94 Tenn., 383, it was held that a party who is injured while traveling on a freight train was not entitled to recover where he induced a conductor to violate a known rule of the railroad company which forbade the taking of passengers on a freight train without a permit from the superintendent. If, therefore, the instruction of the trial Judge is to be taken as announcing a contrary view, it would undoubtedly be error. But we do not so understand it. It must be considered, and was no doubt so understood by the jury, in the light of the evidence of the case relied on by the defendant company. As has been seen from the testimony of the conductor, he had never exacted fare from Venable on any occasion when traveling on his train. The most he had ever done was to call his attention to the rule, and then permit him

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to travel unmolested. He had at no time put defendant in error to the alternative of paying his fare or getting off, as he had no pass, nor did he the morning of the accident. Before it happened he saw Venable riding in his train, yet he did not approach him. He not only did not ask him for fare, but he makes no pretense of a purpose on his part to do so. The presumption is that everyone, not an employee in the service of the company in running the train, and traveling openly in the coaches upon a passenger train is a passenger, and if riding with the knowledge of the conductor, and without interference from him, that he has been accepted by the company as such. 4 Ell. on Railroads, Sec. 1578, and cases cited in notes. The fact that he is riding without the payment of fare makes him none the less the stranger or passenger. *Washburn v. N. & C. R. R.*, 3 Head, 638. And it is evident that such a person cannot be converted into a trespasser until he resists or refuses to comply with the reasonable demand of him who is in charge of the train to pay his fare. That person is the conductor. He is the *alter ego* of the master, clothed with authority to control the train, and, among other things, to determine who shall or shall not be carried on it. He also for himself decides when he will demand fare, requiring a party either to pay it or leave the train. As said in *Washburn v. N. & C. R. R.*,

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supra, the conductor is the officer intrusted by the company "with the duty of excluding all persons not lawfully entitled to be on the train." The case at bar, according to the testimony most favorable for the company, is that of a party traveling on a passenger train under the eyes of the conductor, and who knows that under the rule his duty is to pay fare or furnish a pass, but who is not called upon to do either up to the time of the accident, and it is to this case that this instruction was directed. We think, in such a case, the railroad company cannot be exonerated from responsibility to such a party who suffers injury as a consequence of its negligence or want of care. On the contrary, his presence on the train by the permission of the conductor, to be implied from his knowledge that the party was there, and his neglect to enforce the company's rule by requiring fare or a pass, made such person a passenger, and entitled him to the highest degree of care for his safety. *Jacobs v. St. Paul & C. Railway Co.*, 20 Minn., 125 (S. C., 18 A. R., 360); *O'Donnell v. Alleghany Valley R. R. Co.*, 59 Pa. St., 239; *Washburn v. N. C. & St. L. Ry. Co.*, supra.

Being a passenger, the rule is that negligence was to be presumed from evidence of the collision. 4 Ell. on Railroad, Sec. 1635, and cases cited in notes. Applying the instruction to the facts of the case and in the light of the au-

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thorities, we think there was no error committed by the trial Judge in this regard.

It is next assigned for error that the trial Judge declined two special requests, as follows: "If he (the plaintiff) was riding on his own business, but according to the custom of employees as alleged in the declaration, no presumption of negligence would arise from the mere fact of a collision." And again, "If the facts alleged in the declaration were all true, it would not be such a case of the carriage of a passenger as would authorize you to infer or presume negligence from the mere fact of collision."

The averments of the declaration to which these two requests were directed were as follows: "The plaintiff (at the time of the injury) was a passenger upon one of defendant's—the Chattanooga Rapid Transit Company's—trains from Sherman Heights to Chattanooga, the plaintiff being a servant . . . of the defendant, but not on its said train, and not in the line of his duty at the time; his post of duty being at the station of the company in Chattanooga . . . He (plaintiff) lived in Sherman Heights, and it was the custom and habit of the company to carry him home after his work was finished upon its train, and back to his work," etc.

We think there was no error in declining these requests. If the declaration had averred that plaintiff was at the time of the injury riding to

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his work at its station from his home by the courtesy or kindness of the company, without the payment of fare, there is no doubt the averment would have been good. Then, what difference can it make in the respective rights and liabilities of the parties, that this kindness or courtesy of the company has ripened into habit or custom? Having no connection with the service of the train, and, as is implied from the averment, riding upon it for his own convenience and according to a custom, Venable was a passenger, and the law, on proof of his injury, would infer negligence from the collision which occasioned it.

The weight of authority and of sound policy, we think, is that where a servant performs all his work at a fixed place, and the master, either by custom or as a gratuity, carries him to and from his work, the servant doing no service for the master on the train, he is to be treated as a passenger. *McDonald v. Railroad Co.*, 59 Ind., 246; *Fitzpatrick v. New Albany & S. R. R. Co.*, 7 Ind., 435; *Doyle v. Railroad Co.*, 166 Miss. (S. C., 25 L. R. A., 157); *McNulty v. Penn. Railroad Co.*, 38 L. R. A., 376; *N. J., L. E. & W. R. R. Co. v. Burns*, 51 N. J. L., 340; *State, use Abell, v. Western Md. R. Co.*, 63 Md., 433.

Finding no error in the action of the Court below, the judgment is affirmed.

Daniel v. Coal Co.

DANIEL v. COAL CO.

(Knoxville. October 13, 1900.)

1. REVIVOR. *Writ of error or appeal lies without.*

From a judgment abating an action on account of the plaintiff's death, appeal or writ of error lies without revivor, and in the name of the deceased plaintiff, upon a bond bearing his signature, appended after his death, in those cases for personal injuries, controlled by the statutory provision that "if the deceased had commenced an action before his death, it shall proceed without revivor." (*Post*, pp. 471, 472.)

Code construed: § 4028 (S.); § 3133 (M. & V.); § 2293 (T. & S.).

2. ACTIONS. *For personal injuries survive, when.*

Where a plaintiff commences an action for personal injury, and dies during its pendency, it may proceed, "without a revivor," in the name of the deceased plaintiff; but, to justify a recovery therein, it must be shown on behalf of the plaintiff (1) that plaintiff died of the injury for which his suit was brought; (2) that he left a widow or next of kin. (*Post*, pp. 472-477.)

Code construed: §§ 4024-4028 (S.); §§ 3129-3133 (M. & V.); §§ 2290-2293 (T. & S.).

Cases cited: *Railroad v. Lilly*, 90 Tenn., 564; *Trafford v. Express Co.*, 8 Lea, 97; *Chambers v. Porter*, 5 Cold, 276; *Collins v. Railroad*, 9 Heis., 841; *Railroad v. Pitt*, 91 Tenn., 86.

3. SAME. *Same.*

But it seems that an action for personal injuries may be revived in the name of a personal representative, and prosecuted for the benefit of the estate after the plaintiff's death, even where he died from some cause other than the injury sued for, and without widow or next of kin, under the statute which provides that "no civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived." (*Post*, pp. 477-479.)

Code construed: § 4569 (S.); § 3560 (M. & V.); § 2846 (S.);

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4. SUPREME COURT. *Presumes judgment below correct.*

This Court conclusively presumes that the judgment of the lower Court is correct upon the proof, when there is no bill of exceptions. (*Post*, p. 477.)

Case cited: *Pratt v. Gillespie*, 97 Tenn., 217.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. JOSEPH W. SNEED, J.

INGERSOLL & PEYTON for Daniel.

LUCKY, SANFORD & FOWLER, HENDERSON and JOUROLMON for Coal Co.

CALDWELL, J. In the year 1893 Evan Daniel brought this action to recover damages from the East Tennessee Coal Company for personal injuries which it was alleged to have wrongfully and negligently inflicted upon him in the year 1892. He obtained three verdicts, one of which was set aside by the trial Judge and two by this Court. After the second remand the plaintiff died, and his death was suggested and admitted on the first day of March, 1899, nearly seven years after the alleged infliction of the injuries sued for.

At the third succeeding term the Circuit Judge ordered that the suit be discontinued and abated

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because no steps for a revivor had been taken. To reverse that action the writ of error now before the Court is brought in the name of Evan Daniel, deceased, upon the theory and contention that his suit survived under the statute (Code, § 2293; M. & V., § 3133; Shannon, § 4028), and might by virtue thereof be prosecuted to final judgment without revivor.

The defendant enters a preliminary motion to dismiss the writ of error for the reason that it is prosecuted in the name of the deceased plaintiff, and on a bond in his name as principal obligor.

The statute mentioned provides that a pending suit of the kind contemplated shall proceed after the plaintiff's death without revivor, which means not only that such suit may be prosecuted to final judgment in the lower Court without revivor, but also that, after adverse judgment there, it may be brought into this Court by appeal in error or by writ of error, without revivor, and in the name of the deceased plaintiff. Consequently the motion here made to dismiss this writ of error is not sustainable upon the grounds therein recited, and the case properly stands for hearing on the writ of error as presented.

Is this suit of the class contemplated by that statute?

The artificial common law rule, *actio personalis moritur cum persona*, prevailed in this State until

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modified by Chapter 17 of the Acts of 1851-1852 (*Railway Co. v. Lilly*, 90 Tenn., 564; *Trafford v. Adams Express Co.*, 8 Lea, 97; *Chambers v. Porter*, 5 Cold., 276; *Collins v. Railroad Co.*, 9 Heis., 841), which, with some transposition and change of phraseology, appeared as § 2291 in the Code of 1858. To facilitate the remedy saved by that section (*Chambers v. Porter*, 5 Cold., 277), the codifiers added §§ 2292 and 2293. The former two sections were amended by Sections 1 and 2 respectively of Chapter 78 of the Acts of 1871. Section 2291, as so amended and carried into subsequent compilations, is as follows: "The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin, free from the claims of creditors." M. & V., § 3130; Shannon, § 4024.

Section 2292 and its amendment are carried into subsequent compilations in separate sections. The original section is as follows: "The action may be instituted by the personal representative of the deceased; but if he declines it, the widow and children of the deceased may, without the

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consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not, in such case, be responsible for costs unless he sign his name to the prosecution bond." M. & V., § 3131; Shannon, § 4026.

The amendment, as compiled, is in these words, namely: "The action may also be instituted by the widow in her own name, or if there be no widow, by the children." M. & V., § 3132; Shannon, § 4027.

Section 2293, which is the one most directly affecting the present case, remains unchanged. It is in the language following: "If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as personal property." M. & V., § 3133; Shannon, § 4028.

These four sections were in full force and virtue when Evan Daniel received his injuries, and they are so now. By them the pending controversy is to be decided.

Obviously the last of them refers to the same class of actions as the other three. The object of the first enactment was to preserve to the widow and next of kin of a person dying from the wrongful act of another, the benefit of the

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cause of action which would have followed that act if death had not ensued, and the subsequent enactments were made in furtherance of that single object.

Death from wrongful act, and existence of widow or next of kin are the two controlling facts; and they must co-exist in every instance. When either of them is lacking, no one of these statutory provisions is applicable. If the person wrongfully injured by another commences his suit for damages while living, he does so under the general law; and if he dies from the injury sued for before judgment, leaving a widow or next of kin, his suit survives, and may proceed to judgment under the last quoted provision of the statute (Code, § 2293; M. & V., § 3133; Shannon, § 4026) without revivor. But if either of these essential elements—death from wrongful act and existence of designated beneficiary—be wanting, that provision does not authorize the prosecution of a deceased plaintiff's suit without revivor; nor indeed does it authorize the revivor of such a suit. Like the other quoted provisions (Code, §§ 2291, 2292; M. & V., §§ 3030, 3031, 3032; Shannon, §§ 4025, 4026, 4027) it applies only to the action possessing both of those elements.

Hence, if Evan Daniel died of the injuries for which he sued in this case, and if, in addition, he left a widow or next of kin, his suit was entitled to proceed to final judgment without

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revivor, otherwise it was not entitled to so proceed.

Since the statute authorizes a recovery only when both of these facts exist, the burden of showing their existence in the Court below was, undoubtedly, upon the person or persons seeking to have the suit proceed after the death of the plaintiff. It has been so ruled as to a suit commenced after the death of the injured person (*Railroad v. Pitt*, 91 Tenn., 86, 92), and the reason for the requirement is the same in each instance. In the case cited, the Court, referring to M. & V., §§ 3130, 3131, 3132 (Shannon, §§ 4025, 4026, 4027), said: "To authorize a recovery under the statute before us, two facts are essential in every case; first, a wrongful act by the defendant causing death; secondly, the existence of a widow, child, or next of kin of the deceased to take the recovery. If either of these facts be wanting, the plaintiff must inevitably fail in his action. One fact is as important as the other, and both must be shown before a recovery can be had. Though there be widow, child, or next of kin surviving, the plaintiff must fail if the injury resulting in death was not caused by the wrongful act of the defendant, for in that case the deceased himself had no 'right of action.' Or if the death resulted from the wrongful act of the defendant, and the deceased left no widow, child, or next of kin, the plaintiff must as cer-

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tainly be defeated, because that case would not come within the statute." 91 Tenn., 92, 93. To the same effect is *Railway Co. v. Lilly*, 90 Tenn., 563, 566.

The record before the Court contains no evidence on either of these questions, or any other question; there is no bill of exceptions. In this situation it must be assumed either that those seeking to have the suit proceed after the death of Evan Daniel made no proof at all, or that such as they did make failed to establish the two facts which have been seen to be indispensable to a recovery in a case of this character; and from the one assumption or the other, it follows unavoidably that the judgment abating and discontinuing the suit must be affirmed. In the absence of a bill of exceptions it is conclusively presumed in this Court that the proof before the Circuit Court justified the judgment there rendered. *Pratt v. Gillespie*, 97 Tenn., 217, 219, and citations.

Although the particular statute invoked in support of this writ of error contemplates and embraces no case in which it does not appear that the deceased plaintiff died from the effects of the wrongful act for which he sued, and also that he left widow or next of kin, and although this statute furnishes no authority for the further prosecution of a deceased plaintiff's suit that does not possess both of those elements, either without

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or with revivor, there was nevertheless ample remedy for the continued prosecution of the present case wanting in those elements as it seems to be. There is another statute under which this suit could have been revived in the name of the personal representative of the deceased plaintiff for the benefit of his estate, though his death may have resulted from an independent cause, and though he may have died without either widow or next of kin surviving. The latter statute is in these words, viz.: "No civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived." Code, § 2846; M. & V., § 3560; Shannon, § 4569.

Shannon in his compilation rightly refers to Chapter 77 of the Acts of 1836 as the origin of this provision, but the exception incorporated in the original Act was more comprehensive than that found in the codification above quoted, including as it did "actions for wrongs affecting the person," as well as those for "wrongs affecting the character" of the plaintiff. The original Act left actions for injuries to the person within the common law rule of abatement upon the death of the plaintiff, and, as stated in a former part of this opinion, and in cases cited, that rule prevailed in full force in this State until the passage of the Act of 1851-52, Chapter 17. The ex-

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ception appearing in the Act of 1836, referred to, was narrowed by the codifiers in 1858, and it first took effect in its narrower form with the adoption of the Code in that year.

Let the judgment be affirmed.

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110	9

LIGHT & CO. v. INSURANCE CO.

(Knoxville. October 20, 1900.)

1. FIRE INSURANCE. *Policy severable, when.*

A fire policy for \$600, taken by a liveryman and distributed as follows, to wit: "\$275 on live stock, \$275 on rolling stock, carriages, buggies, etc., and \$50 on the harness, combs, etc.," is not an entire and indivisible, but a severable, contract. (*Post*, pp. 481-483.)

Case cited: *Insurance Co. v. Connely*, 104 Tenn., 93.

2. SAME. *Policy not rendered void by liens on insured property.*

The statute which provides that no misrepresentation or warranty of the insured "shall be deemed material, or defeat or avoid the policy or prevent its attaching, unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increase the risk of loss," so far modifies and controls the contract of fire insurance in this State, that the mere existence of liens on insured personalty by mortgage or by retention of title for purchase price, does not constitute a violation, in the absence of fraud, of the provisions in the policy, making it void "if the interest of the insured in the property be not truly stated," or "if the interest of the insured be other than the unconditional and sole ownership," or if the insured property "be or become incumbered by a chattel mortgage." Such liens do not increase the risk, as the secured debt would remain after destruction of the property. (*Post*, pp. 483-490.)

Act construed: Acts 1895, Ch. 160, § 22.

Code construed: §3306 (S.).

Cases cited: *Insurance Co. v. Crockett*, 7 Lea, 727; *Delahay v. Insurance Co.*, 8 Hum., 684; *Insurance Co. v. Barker*, 7 Heis., 504.

3. SAME. *Same.*

The insurer has in such case an equitable title to the property, alike whether the legal title has been retained by his vendor for the purchase price or he has himself conveyed the property by mortgage. (*Post*, pp. 486-489.)

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Code construed: §§ 3666, 3670 (S.).

Cases cited: *Catron v. Insurance Co.*, 6 Hum., 177; *Gudger v. Barnes*, 4 Heis., 570; *Tharpe v. Dunlap*, 4 Heis., 682; *Irvine v. Muse*, 10 Heis., 477.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

J. V. WILLIAMS and T. C. LATIMORE for Light
& Co.

ANDREWS & ANDREWS & SMITH for Insurance
Co.

McALISTER, J. This is a suit upon a policy of fire insurance. The property covered by the policy comprised horses, carriages, and harness employed in complainant's livery stables on Broad street, in the city of Chattanooga. The amount of the indemnity was \$600, distributed as follows, to wit: \$275 on live stock, \$275 on rolling stock, carriages, buggies, etc., and \$50 on the harness, combs, etc. On the night of November 13, 1898, the entire property was destroyed by fire. The defendant company resisted the payment of the policy upon the ground of a breach of the following stipulations in the contract of insurance, namely: "This entire policy shall be void if the

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insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof, or if the interest of the insured in the property be not truly stated," etc.

Again it is provided, viz.: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the interest of the insured be other than the unconditional and sole ownership, or if the subject of the insurance be personal property, and be or become incumbered by a chattel mortgage."

Defendant insisted these clauses of the policy had been violated, for the reason that at the time the insurance was effected C. R. Baird & Co. retained title to two surreys, one buggy, and one pair of harness of the insured property. Further, that the Milburn Wagon Co. retained title to one surry, a pair of harness, and one buggy. This retention of title was by vendors to secure unpaid purchase money. It was further insisted that the Citizens Bank & Trust Co., of Chattanooga, at the time said policy was issued, had a chattel mortgage on two of the horses and one surry of the insured property, to secure an indebtedness of \$125.

A majority of the Court of Chancery Appeals, reversing the decree of the Chancellor, found the existence of the incumbrances alleged upon the insured property, and being of the opinion that the

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policy was thereby avoided, dismissed complainant's bill.

The more specific holding of the Court of Chancery Appeals was, that the retention of title by vendors to secure balance of purchase money to part of the property insured, violated that clause of the policy against unconditional and sole ownership, and that the deed of trust for benefit of the Citizens Bank and Trust Co. violated that clause of the policy against chattel mortgages.

Complainant appealed and has assigned this holding of the Court as error.

It may be stated, preliminarily to the consideration of the assignment of errors, that the Court of Chancery Appeals held the policy in question to be severable, and not entire or indivisible, and this for the reason that the property covered by the policy was separately classified and valued, and a determinate part of the indemnity affixed to each class. We concur with the Court of Chancery Appeals in this conclusion, but since the holding is not before us for review, the defendant company not having appealed, we pretermitt any elaboration of the subject. See *Home Fire Insurance Co. v. Connolly*, 20 Pickle, 93.

The first assignment of error upon complainant's appeal is that the Court of Chancery Appeals was in error in holding that the provision in the policy for unconditional and sole ownership was breached by the outstanding title in the vendor to part of the

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property insured to secure the balance of purchase money, and that the entire policy was thereby avoided. The Court of Chancery Appeals found that at the time the policy issued a horse embraced in the first classification of the insured property and a surrey embraced in the second class were incumbered by a deed of trust or mortgage to secure a debt of \$125 to the Citizens Bank and Trust Co., of Chattanooga; that C. R. Baird & Co. retained and held title to two surreys and one buggy embraced in the second class, and that the Milburn Wagon Co. held title to one surrey embraced in the second class, and one pair of harness embraced in the third class.

It will be observed that the property insured was divided into three classes, with a prescribed amount of insurance upon each class, and that there was property in each class under mortgage, or the title to which remained in the vendors of complainant for payment of purchase money. The Court held that although the policy was severable, still complainants were not entitled to recover because articles of the insured property in each class were incumbered by mortgages or by the vendor's retention of title, thus contravening the express stipulations of the policy already mentioned.

We will first consider the alleged breach of the clause requiring sole and unconditional ownership, for this is distinct from the other clauses avoid-

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ing the policy if the personal property is incumbered by a mortgage. We remark in the first place that while there are a number of cases on the subject in our own reports, the citations of the Court of Chancery Appeals are exclusively from other States, and our own cases, so far as the opinion of that Court discloses, were not considered or cited.

In the case of *Insurance Co. v. Crockett*, 7 Lea, the policy insured a dwelling house upon which a vendor's lien had been retained. The Court said:

"In the case of *Delahay v. Memphis Ins. Co.*, 8 Hum., 684, it was held definitely that the existence of a mortgage on the property insured, not disclosed, was not a circumstance material to the risk, and would not avoid the policy. In the case of *Manhattan Ins. Co. v. Barker*, 7 Heis., 504, it was a term of the policy that 'it should be void if the interest in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, and this be not represented to the company.' This language is identical with that found in the present policy. The case was, that Barker had purchased the goods insured, paid a portion of the purchase money, the goods had been conveyed to him by his vendor, but a lien retained in the bill of sale to secure the unpaid balance of the purchase money . . . We can

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see no difference in principle between the principles announced and the one that will sustain the holding of the Circuit Judge in the present case. If the existence of a lien by contract, undisclosed, does not vitiate a policy, then one merely based on the retention of the title, by the vendor, would have no more effect, as far as we can see. It is insisted that in the last case the legal title was in the vendee, subject to the charge for balance of purchase money, and this should distinguish the case from the present one. But the case in 8 Hum. was the case of an unsatisfied mortgage, where the legal title was in the mortgagee, the insured having only the equitable title. There can be no distinction in principle, as this Court has said, between a legal title conveyed and one retained as security for purchase money. We think the reasoning of Judge Green, 8 Hum., 684, 685, sound on this question, that a mortgage is only security for the debt, and if the property is destroyed the debt remains; so that the assured has as much interest in protecting the property as if there were no incumbrance on it. He therefore held the mortgage was not a circumstance that increased the risk, and failure to disclose did not vitiate the policy. If this be correct, then the failure to disclose the fact that the property was incumbered by the lien was not material to the risk in this case, and certainly it ought not to be held that the

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terms of this policy required such a disclosure, regardless of whether the risk was affected by it or not, and especially where no inquiry was made as to the state of the title, as in this case. It is not questioned but that the insured had an insurable interest in this property, and it is equally certain he had a complete equitable title, and was as much interested in the preservation of his dwelling as if there had been no lien on the lot on which it stood." 7 Lea, 727, *et seq.*

A purchaser of personal property in a conditional sale reserving the title, is the equitable owner of the chattel. Shannon's Code, §§ 3666-3670; *Catron v. Ins. Co.*, 6 Hum., 177; *Duprean v. Ins. Co.*, 76 Mich., 615.

Again, it is provided by the Act of 1895, Chapter 160, Section 22 (Shannon's Code, § 3306), viz.: "No written or oral misrepresentation or warranty therein made in the negotiations of a contract or policy of insurance, or in the application therefor by the assured or in his behalf, shall be deemed material or defeat or avoid the policy or prevent its attaching unless such misrepresentation is made with actual intent to deceive, or unless the matter represented increase the risk of loss."

The Court of Chancery Appeals finds as a fact complainant was guilty of no fraud, concealment, or misrepresentation in procuring the policy, and under the cases already cited, the existence of a

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lien or mortgage on the property insured is not, as matter of law, material to the risk. Counsel for defendant company thinks the case of *Delahay v. Ins Co.*, 8 Hum., wholly inapplicable, for the reason that the policy did not contain the covenant against mortgages and incumbrances which is found in the present policy. But that case does decide that an undisclosed mortgage on the insured premises was not material to the risk, and the Act of 1895 declares that unless the misrepresentation or warranty in the policy increase the risk of loss it shall not defeat the policy. It is also said that the case of *Manhattan Ins. Co. v. Barker*, 7 Heis., 503, is inapplicable, for the reason that it appeared the insured had the legal title to the goods, and his vendor a mere lien for the purchase money, and the Court held this did not affect the clause providing for unconditional and sole ownership by the insured. It is insisted in this case both covenants are violated, the one against mortgages and incumbrances and the other as to the unconditional and sole ownership of the goods by the insured. But certainly the Barker case is precisely applicable to the facts of the case now being decided, so far as the retention of title by the vendors of complainant to certain items of the insured property is concerned.

Again, it is objected that *Ins. Co. v. Crockett*, 7 Lea, is not in point, for the reason the in-

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insurance in that case was effected on a house, which the insured held under a title bond, and that a title bond has always been considered a lien merely, and hence the case does not apply where there has been a transfer of the title, as in a mortgage or deed of trust. The holder of a bond for title is regarded as the equitable owner of the land, while the legal title is in the vendor. *Gudger v. Barnes*, 4 Heis., 570; *Tharpe v. Dunlap*, 4 Heis. 682; *Irvine v. Muse*, 10 Heis., 477.

We think it wholly immaterial whether the incumbrance on the insured property is in the form of a lien merely or a mortgage, since our cases declare that such conditions do not increase the risk. Stress has been laid in argument on the moral risk as an important element always to be considered in insurance contracts, and so we have held. *Home Ins. Co. v. Connelly*, 20 Pickle.

As said by Judge Green in *Delahay v. Ins. Co.*, 8 Hum., 684, a mortgage is only a security for the debt, and if the property be destroyed, the debt remains; so that the assured has as much interest in protecting the property as if there were no incumbrances on it. He therefore held the mortgage was not a circumstance that increased the risk, etc.

We do not think the clause in the policy prohibiting a chattel mortgage on the insured property effective to avoid this policy, since the stat-

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ute declares that the misrepresentation or warranty must be material, and its breach such as to increase the risk. We are constrained, therefore, to hold, in view of our statute and decisions, regardless of what may be held elsewhere, that the facts found by the Court of Chancery Appeals do not avoid the policy in question, and that complainant is entitled to recover.

The decree of the Court of Chancery Appeals is reversed.

Woodruff v. Roysden.

WOODRUFF v. ROYSDEN.

(*Knoxville*. October 20, 1900.)

1. ADVERSE POSSESSION. *By father and son.*

Adverse possession of land held jointly by a father and his minor son for the term of seven years, under a deed purporting to convey the title in fee to the son, invests him with title.

Case cited: *McLemore v. Durivage*, 92 Tenn., 482.

2. SAME. *By tenants in common.*

Adverse possession of land held by one of several tenants in common, but not adversely to his co-tenants, for the term of seven years, under deeds purporting to convey the lands in fee to the several tenants in common, invests them all with title according to their respective claims.

Cases cited: *Cunningham v. Roberson*, 1 Swan, 138; *Merriweather v. Vaulx*, 5 Sneed, 311; *Elliott v. Holder*, 3 Head, 699.

3. SAME. *Successive possessions may be connected.*

And the successive possessions of different tenants in common, holding under deeds, may be connected to make out the requisite seven years.

Cases cited: *Nelson v. Trigg*, 4 Lea, 701; *Ellege v. Cooke*, 5 Lea, 623; *Napier's Lessee v. Simpson*, 1 Tenn., 448.

4. SAME. *Continuity of, not broken.*

The continuity of adverse possession, held under a deed to the possessor, is not broken by suit and recovery against his vendor after the making of the deed.

FROM SCOTT.

Appeal from Chancery Court of Scott County.
 HUGH G. KYLE, Ch.

Woodruff v. Roysden.

NORMAN B. MORRELL and LUCKY, SANFORD & FOWLER for Woodruff.

TEMPLETON & CARLOCK for Roysden.

WILKES, J. This is an action of ejectment to recover 1,000 acres of land in Scott and Fentress counties. There are two bills consolidated and heard together in the Court below, and the controversy as it comes to this Court only involves 1,000 acres, or so much of a 5,000-acre tract as is embraced in two deeds from Cyrene Carson and wife, one to Chandler and Smith, of date November 6, 1882, and the other to John Carson, dated December 27, 1887. These deeds purport to convey an undivided interest of two-thirds to Chandler and Smith and one-third to John Carson. The complainants deraign their title from the State, while the defendants claim under the deeds stated, coupled with more than seven years' adverse possession.

The Court of Chancery Appeals, after reviewing the evidence, reports that the Carsons entered upon the land and erected improvements in 1885, and went to live upon it in 1886, and the deed was made to John Carson in 1887, and from that time up to the filing of the bills in these causes, John Carson was in actual possession of the land, claiming for himself and his co-tenants, Chandler and Smith, openly, continuously, exclusively, and adversely—that is, he occupied the land with his

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father, the latter being the head of the household—and that Court concludes, as a matter of law, that being a mixed possession, the true possession and holding is in the son, who had the legal title.

The bill against John Carson was filed July 13, 1896, or over eight years after he had taken and been in possession, and the Court of Chancery Appeals concludes that he is protected by his plea of seven years adverse possession under the statute of limitations. And this we think is correct, even if the son be a minor. *McLemore v. Durivage*, 92 Tenn., 482, and cases there cited.

The bill against Chandler (for Smith is not sued) was filed December 27, 1894. He was never in actual possession, but insists that the successive possessions of Cyrene and John Carson inured to his benefit, they being tenants in common with him, that is, Cyrene Carson from 1882 to 1887 and John Carson after that date.

The Court of Chancery Appeals reports that the Carsons, father and son, entered upon the land in 1885 and made improvements, and that they moved upon it in 1886 and continued to occupy it till these suits were brought.

Cyrene Carson claimed the land under a deed executed to him by Marion in 1867, and up to 1882, when he conveyed an undivided two-thirds interest to Chandler and Smith; he claimed it alone. After that date he claimed it as a tenant

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in common with Chandler and Smith up to 1887, when he conveyed his one-third interest then owned to John Carson, and John Carson and Chandler and Smith became tenants in common. Now two questions arise under this state of the case. One is, Did the holding by one tenant in common inure to the benefit of the other tenants in common, and if so, could the successive holding of two different tenants in common be joined together and inure to the benefit of the tenant in common not in possession.

We think that the possession of one tenant in common is the possession of all unless he claim to hold exclusively for himself; and will exclude all adversary constructive possession in another having the legal title to the land. *Cunyngham v. Roberson*, 1 Swan, 138; *Merriwether v. Vaulx*, 5 Sneed, 311; *Elliott v. Holder*, 3 Head, 699.

We are of opinion also that the successive possessions may be connected when the parties hold under color of title and not as mere naked trespassers without color of title. *Nelson v. Trigg*, 4 Lea, 701; *Ellege v. Cooke*, 5 Lea, 623; *Napier's Lessee v. Simpson*, 1 Tenn., 448-453.

The adverse possession in this case commenced in 1885 by Cyrene Carson, holding for himself and Chandler and Smith. It so continued until 1887, when the adverse possession shifted with the title to John Carson, holding for himself and Chandler and Smith.

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We think the suit in the Federal Court in 1889 is not material. It was brought against Cyrene Carson, who did not then claim to own the land and was not in possession, and this suit could not interrupt the possession of John Carson or Chandler and Smith, the true owners. At that time Cyrene Carson was not holding for them. There does not appear to have been any actual entry under the writ of possession. The Court of Chancery Appeals reports that the facts intended to show that John Carson and Chandler and Smith aided such a suit, only appears in the statement of Cyrene Carson, and that Court refuses to credit the statement altogether, so that the facts do not appear upon which to base an estoppel if the principle could apply.

We are of opinion, therefore, that the decree of the Court of Chancery Appeals should be affirmed as to John Carson and reversed as to Chandler, and the bill should be dismissed at cost of complainants.

Prater, Admr., v. Marble Co.

PRATER, ADMR. v. MARBLE CO.

(Knoxville. October 20, 1900.)

1. PLEADING AND PRACTICE. *No replication allowed to plea of accord and satisfaction, when.*

Where, in an administrator's action for personal injury causing death of his intestate, the defendant pleads accord and satisfaction with the widow, it is not permissible for the plaintiff to reply either denying the fact and existence of such accord and satisfaction, or averring that it was void for fraud. This must be done in conjunction with the widow or by her alone in some appropriate proceeding.

Cases cited: Holder v. Railroad, 92 Tenn., 141; Greenlee v. Railroad, 5 Lea, 418; Stephens v. Railroad, 10 Lea, 448.

2. SAME. *Final judgment entered for want of pleading, when.*

And, where, in an administrator's action for personal injury causing his intestate's death, the defendant pleads not guilty, on which issue is joined, and also accord and satisfaction with the widow, to which plaintiff replied (1) no accord and satisfaction, and (2) that if there was it was obtained by fraud, the Court, upon sustaining demurrer to the replications as containing matter that the widow alone could set up, upon plaintiff's failure or inability to offer any other replication, proceeds to enter final judgment dismissing the action without trial upon the issue of not guilty.

FROM KNOX.

Appeal in error from Circuit Court of Knox County. JOSEPH W. SNEED, J.

Prater, Admr., v. Marble Co.

V. A. HUFFAKER and WASHBURN, PICKLE & TURNER for Prater.

J. C. J. WILLIAMS and CORNICK & CORNICK for Marble Co.

WILKES, J. The plaintiff's intestate died as the result of injuries received while in the employ of the defendant company, leaving a widow. She compromised her right of action and gave the company an acquittance and discharge of any cause or causes of action, claims and demands, against it arising or growing out of the death of her husband.

Thereafter plaintiff procured letters of administration on the estate of the decedent and brought suit as administrator. There was a plea of not guilty, and accord and satisfaction on the part of the widow, which was set out in writing with the plea.

Issue was joined on the first plea and as to the second there was a replication denying the accord and satisfaction and averring that if an acquittance was executed she was in ignorance of its contents and it was obtained by fraud and misrepresentation.

On the suggestion of the trial Judge that the second plea tendered an immaterial issue and made a departure in pleading, the rejoinder to the replications was withdrawn and they were demurred to, and the demurrer sustained.

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Another replication was then filed in substance that the widow had made no compromise, and that she did not execute the instrument or receipt set out in the plea. To this replication there was also a demurrer claiming that the administrator could not set up that the discharge and acquittance was not executed by the widow; that the replication was in effect a plea of *non est factum* and could be interposed only by the party alleged to have executed it; that the alleged instrument could not be assailed at law for fraud or duress, but could only be set aside by proper proceeding in equity.

This demurrer was sustained, and the plaintiff declining to make any further response to the plea, judgment by default was taken and the suit was dismissed. Plaintiff appealed to this Court, and has assigned as errors that the Court should not have sustained the demurrers.

The demurrers rest practically on the same ground,—that the administrator has no right to question the settlement made by the widow, but that such defense is personal to the party executing the paper.

We are of opinion that under our statutes and the rulings of this Court that the right of action for the death of the husband rests primarily in the widow. She has the primary right of suit. She not only has power to compromise a pending suit but likewise to compromise the entire

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right of action before suit is brought and to receive the amount stipulated for and execute an acquittance and discharge, and such compromise is binding. *Holder v. Railroad*, 8 Pick., 141; *Greenlee v. Railroad*, 5 Lea, 418; *Stephens v. Railroad*, 10 Lea, 448.

But the question recurs, Can the administrator, when the defense of settlement by the widow is interposed, be allowed to say that it was not in fact entered into or that it was procured by undue measures. It is said that if this be held, then the defendant can interpose a forged paper acquittance or one procured by fraud, and defeat any recovery.

While there is something in this suggestion it is stating the case too strongly. If the acquittance attempted to be interposed is really and in fact a forgery, or has been procured by duress or fraud as against the widow, it would only require that by proper proceeding she contest the same either for herself or with the administrator. We need not decide now whether this must be done in a Court of Equity or can be done in a law Court. It is sufficient to say that she may in her own proper person and by proper proceeding set up the fact if it exists.

The replication in this case, while sworn to, is not equivalent to a plea of *non est factum*; first because it is not made by the party whom it is alleged executed the paper, and, second, it

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does not state that the instrument was not executed by the widow nor by any one authorized to bind her in the premises. The real matter intended to be interposed is not that she did not execute the paper, but that it was obtained by fraud and misrepresentation. This is matter which we think can be set up by the widow alone or in conjunction with the administrator, and not by the administrator alone. For aught the Court can see the widow does not consider that the compromise was obtained unduly. She may not desire to disturb the settlement. She may be content with the compromise, and, being solely entitled to the recovery, as she is in this case, and having the power to give an acquittance, the administrator cannot control her discretion to thus dispose of her rights in the matter without her consent and co-operation.

We are of opinion, therefore, there is no error in the record and judgment of the Court below, and it is affirmed with costs.

BRIEF ON PETITION TO REHEAR.

To the Honorable Supreme Court of the State of Tennessee:

Your petitioner, W. W. Prater, administrator, the plaintiff and appellant, respectfully shows unto the Court that he is much aggrieved by the opinion and decision of this Court, rendered herein on October 20, 1900, and the judgment in pursuance

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thereof, affirming the judgment of the Court below, and dismissing his suit. This decision is based upon erroneous conclusions both of fact and of law in the particulars hereinafter shown.

Your Honors find and state as facts that the widow of the plaintiff's intestate compromised her right of action and gave an acquittance and discharge of any cause or causes of action, claims and demands, against the defendant, arising and growing out of the death of her husband, and that thereafter the plaintiff procured letters of administration on the estate of the deceased and brought suit as administrator, and upon these supposed facts rest the decision of this case; whereas, the facts as disclosed by the record are just the reverse of this statement. The supposed facts rest upon the averments of defendants' plea alone. The paper purporting to be an acquittance is not in the record. It is merely set out by averment in the plea.

Your Honors have fallen into this error of law: You have given to the defendant's demurrer to the plaintiff's replication the effect of admitting the truth of all the allegations in the defendant's plea of accord and satisfaction; whereas, the demurrer admits the truth of the replication, and not of the plea, and the replication explicitly denies the allegations of the plea.

Therefore the undisputed and admitted facts in this record are that the widow of the plaintiff's

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intestate did not compromise her right of action, and did not give the defendant an acquittance and discharge of any cause or causes of action, claims and demands, against it, arising and growing out of the death of her husband.

Again, your Honors, erroneously treating this demurrer to this replication as a demurrer to the plea, have held that the facts stated in the plea constitute a good defense to the plaintiff's suit, and, as though that defense had been fully sustained by proof, proceeded to dismiss the plaintiff's suit. That this plea presents a good defense, the plaintiff admitted by not demurring, and by filing a replication thereto. That the facts as stated in that plea are true, is a wholly different proposition, and this he seeks to controvert, and put in issue; but that right, by your Honors' decision, is denied him. He seeks also the right—constitutional right—of having that issue of fact submitted to a jury for trial; but your Honors' decision denies him that right. Indeed, it adjudges these facts against him without issue, without trial, without proof, and in the face of the defendant's admission by demurrer that they are not true.

The results of this decision are much more far-reaching and serious than the mere dismissal of this suit, and therefore we respectfully submit that it deserves further serious consideration. If it is sustained, it renders it impracticable for an administrator,

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notwithstanding his statutory right thereto, to maintain a suit for fatal injuries to his intestate, where the deceased leaves a widow or children, who may in the first instance bring the suit or compromise or settle the right of action.

It is an anomaly in pleading and practice that a defendant can offer any plea to the plaintiff's declaration which alleges a good defense to the suit, and yet the plaintiff cannot controvert its allegations and make an issue thereon. Here it is held that an accord and satisfaction with and by the widow is a good defense to a suit by the administrator, but that no one save the widow herself can controvert the facts alleged by the plea. She cannot controvert them in this suit, for the very good reason that she is not a party to the suit. Therefore the administrator, the plaintiff, must of necessity hold his peace, admit by his silence the truth of the plea, and let his suit be dismissed. The administrator cannot compel the widow to become a party.

The result is that to every such suit the defendant need only offer such a plea, and without more the suit ends. The defendant need not even forge an acquittance and discharge from the widow. He need only to aver one in his plea, and that averment cannot be denied by the plaintiff, and therefore defendant can never be put to the proof of his averment. This will be the only self-proving plea known to the practice.

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If we are right in our conception of the logical results of this decision, we respectfully suggest that they must have escaped this Honorable Court's attention, and that it does not intend to establish such a rule of pleading and practice.

For the errors aforesaid, we pray the Court to rehear this case and reverse its former decision.

WASHBURN, PICKLE & TURNER,
Attorneys for Plaintiff.

OPINION ON PETITION TO REHEAR.

WILKES, J. This is a petition to rehear, based upon the ground that the Court has mistaken both the law and facts on the original hearing. If this be true the petitioner is entitled to relief. The error of law alleged is this: The suit was brought by the administrator to recover damages for the death of his intestate, for the benefit of the widow. The defendant interposed a plea that the widow had compromised and settled her claims against the company, and what purported to be her written acquittance was filed with the plea and made part of it. There was a replication to this plea denying that there was any accord and satisfaction, and in the alternative, that if an acquittance was executed by the widow she was in ignorance of its contents and meaning and it was obtained by fraud.

This replication was demurred to and the demurrer was sustained. Thereupon another replica-

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tion was filed, substantially the same as the first, and making virtually a plea of *non est factum*. though defectively stated, to the written acquittance filed. This was also demurred to, and this demurrer sustained. Thereupon the record states that defendant, by attorney, moved for a judgment by default against the plaintiff for want of replication to the plea, and the plaintiff's attorney declined to make further replication than as had been already filed, and judgment by default was taken and the suit was dismissed.

As we understand the petition to rehear, the insistence is that the demurrer admitted the truth of the matters stated in the replication, while it is alleged this Court held it in effect to be an admission of the truth of the plea.

It is true the demurrer to the replication admitted the truth of its statements, but this admission, as in all cases of demurrer, was only for the purpose of testing the sufficiency of the replication. It does not extend beyond that. The replication having been declared bad on demurrer, passes out of the record as though it had never been filed, except for purposes of review. It has been reviewed in this case and found to be bad. After the replication was thus disposed of, plaintiff was given the opportunity to make further defense or answer to the plea but declined to do so, and judgment by default was taken against him in the absence of further defense. So that

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the admission of the truth of the plea was made by plaintiff himself by refusing to reply to it. It results that the facts as admitted by plaintiff himself on his default are that the widow did make the accord and satisfaction as the plea alleges.

Plaintiff complains that this Court held that the plea constituted a good defense and proceeded to dismiss the plaintiff's suit as though the plea had been sustained by the proof. The plaintiff's suit was dismissed because the plaintiff himself refused and failed to deny the truth of the plea after his insufficient replication had been successfully demurred to, and for all purposes in the Court below stricken out. Plaintiff in his petition states that he admitted the sufficiency of the plea as a defense by not demurring to it, but that the truth of the plea is a wholly different matter and he desires to controvert and put that in issue.

But that is exactly what he was called on to do in the Court below, viz., to put the plea in issue, but he declined to do so, and default was taken. He not only declined to put the truth of the plea in issue but made no complaint in the Court below that it refused to allow him to do so. He could not assign such complaint, as the record shows he was invited to put it in issue properly after his insufficient replication was rejected, and he refused to so do.

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It is true the facts are adjudged against him, without issue, without trial, without proof, as he states, but it was wholly upon the ground that he refused to controvert them by a proper replication.

Now, as to the merits of the case, that has already been passed upon, and the objections made to the holding of the Court now were fully considered and passed on on the original hearing.

It is said the widow cannot in this suit controvert the fact of a settlement and compromise by her, for she is not a party to the suit. She is the sole beneficiary. No one else has any interest in the suit and can have none in the recovery. If she wishes to controvert the fact that she has compromised, she can certainly do so by proper proceeding by herself or in conjunction with the administrator, as was said in the original opinion, but the administrator cannot compel her to repudiate her settlement and permit a suit to be brought for her use notwithstanding such settlement.

We cannot see that the right of any widow to question a compromise said to have been made by her is involved. The question decided is, that an administrator cannot do so unless she joins with him or in her own right seeks to avoid it.

The petition is dismissed.

Judge Caldwell dissents.

Lewis v. Mynatt.

LEWIS v. MYNATT.

(*Knoxville*. October 20, 1900.)

1. **DESCENT AND DISTRIBUTION.** *Husband takes estate of his intestate wife who was an illegitimate, when.*

The husband takes, under our statutes, the entire estate, real as well as personal, of a deceased wife, who was an illegitimate and died intestate, to the exclusion of the children and heirs of her mother's deceased brother. (*Post*, pp. 509-514.)

Act construed: Acts 1885, Ch. 34.

Code construed: §§ 4166, 4167 (S.); § 3273 (M. & V.); § 2423 (T. & S.).

Cases cited: *Webb v. Webb*, 3 Head, 69; *Scoggins v. Branes*, 8 Bax., 560.

2. **STATUTES.** *Construction.*

The established rule of construction that a statute purporting to cover an entire subject repeals all unexcepted statutes previously passed on the same subject, finds no application where the later statute, though employing some general and comprehensive language on the subject as treated in previous statutes, does not purport to cover the entire subject, and, *a fortiori*, the rule does not apply where the later statute purports to amend or make additions to "existing laws." (*Post*, pp. 511, 512.)

Act construed: Acts 1885, Ch. 34.

Cases cited: *Terrell v. State*, 86 Tenn., 523; the *Druggist Cases*, 85 Tenn., 449; *Poe v. State*, 85 Tenn., 495, *Cole Mfg. Co. v. Falls*, 92 Tenn., 607; *State v. Butcher*, 93 Tenn., 679; *Chattanooga v. Neely*, 97 Tenn., 527.

3. **SAME.** *Same.*

The real intent of the Legislature, as disclosed by a consideration of a statute as a whole, always prevails over the adverse technical import of particular words. Hence the word, "relatives," in a statute of descent and distribution will be held, if the unmistakable intent of the Legislature requires it, to include relationship by affinity as well as consanguinity, al-

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though in its narrow technical sense, it embraces only the latter. (*Post*, pp. 512-514.)

Case cited: *Rose v. Wortham*, 95 Tenn., 505.

FROM KNOX.

Appeal from Chancery Court of Knox County.
LEON JOUROLMON, Sp. Ch.

SANSOM, WELCKER & PARKER, and G. H. MYNATT for Lewis.

E. F. MYNATT, J. C. FORD, and C. T. CATES, Jr., for Mynatt.

CALDWELL, J. Orlena Mynatt, the deceased intestate, wife of the defendant William Mynatt, was an illegitimate child. She had no issue, and left no mother, no brother, no sister, and no descendant of either brother or sister. After her death the children and heirs at law of her mother's deceased brothers brought this bill to recover what was alleged to be her estate, real and personal, from her surviving husband.

The Special Chancellor and the Court of Chancery Appeals refused the relief sought as to the personalty, upon the ground that it belonged to the husband in his own right, but they awarded a recovery of the real estate upon the ground, as stated in the opinion of the latter tribunal,

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that Chapter 34 of the Acts of 1885 is believed to cover the entire subject of the descent of property of illegitimate persons dying intestate, and to thereby impliedly repeal all former enactments on the same subject, and pass the estate of such persons to remote relatives by blood in preference to a surviving husband or wife.

The defendant alone has appealed.

Previous legislation on the subject mentioned was carried into the Code of 1858 at § 2423, which is in the language following: "When an illegitimate child dies intestate, without child or children, husband or wife, his real and personal estate shall go to his mother; and if there be no mother living, then equally to his brothers and sisters by his mother, or descendants of such brothers and sisters." T. & S. Code, § 2423; M. & V. Code, § 3273; Shannon's Code, § 4166.

This statute by necessary implication passes the estate, real and personal, of every illegitimate person, dying intestate and without issue, to her or his surviving "husband or wife" (*Webb v. Webb*, 3 Head, 69; *Scoggins v. Branes*, 8 Bax., 560), and if unrepealed, it undeniably confers the estate here involved upon the defendant. It was confessedly in full force and virtue up to the time of the passage of Chapter 34 of the Acts of 1885, and is still so unless thereby repealed.

That Act, so far as relevant to the present inquiry, caption and body is as follows:

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“AN ACT to provide for the descent of the estates of illegitimate persons who die intestate, leaving no relatives entitled to such estates under existing laws, and to amend § 2423 of T. & S. Code.

“SECTION 1. *Be it enacted by the General Assembly of the State of Tennessee,* That the estates, both real and personal, of illegitimate persons dying intestate in this State leaving no relatives entitled by existing laws to his or her estate, shall go to such persons as would, had the intestate been legitimate, have been his or her heirs on his or her mother's side, in such way and proportions, and under the same rules, as provided by existing laws of descent of real and personal estates among legitimates who have no kin on the father's side.” Shannon, § 4167.

No rule is more firmly established than that a statute purporting to cover an entire subject repeals all unexcepted statutes previously passed on the same subject (*Terrell v. The State*, 86 Tenn., 523; *The Druggist cases*, 85 Tenn., 449; *Poe v. State*, 85 Tenn., 495; *Cole Mfg. Co. v. Falls*, 92 Tenn., 607; *State, ex rel., v. Butcher*, 93 Tenn., 679; *Chattanooga v. Neeley*, 97 Tenn., 527, 532); but we do not think the present case is one calling for or allowing the application of that rule. It is true the latest statute here involved employs some general and comprehensive language in regard to a subject treated in previous enactments, yet it does not purport to cover the entire subject. On the contrary, it expressly limits itself,

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in both caption and body, to so much or such part of the subject as is not embraced in "existing laws," and thereby discloses an unmistakable purpose of amendment only, and that by way of mere addition. Moreover, the last clause of the title recites that the object is "to amend" the section of the Code first quoted in this opinion. It is only when the designated decedent left "no relatives entitled by existing laws to his or her estate," that this Act of 1885 was intended to apply. Its object was simply to supply an omission, and by amendment extend the line of contingent beneficiaries beyond its previous terminus, and not to change any provisions already made. We are unable to discover in this Act the slightest indication of an intention to alter "existing laws" otherwise than by mere enlargement and extension.

It is suggested that the use of the term "relatives," in that clause, "leaving no relatives entitled by existing laws to his or her estate," shows an intention to eliminate the words "husband or wife" from the previous statute, and thereby remove the surviving marital partner from the position of a beneficiary thereunder. This view, however, is clearly not a sound one. It is not required by the term itself, nor is it warranted by the context.

There can be no doubt that the word "relative," when employed in a strictly technical sense, signi-

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fies a relationship by blood only; but, as ordinarily used, it includes relationship by affinity as well as by consanguinity, and we are convinced, from a careful study of the Act, that those passing it had this broader signification in their minds.

As before remarked, the "existing laws" were regarded as sufficient and proper in all particulars within their scope, and the obvious purpose was only to make an addition or supplement to them, to meet cases not already provided for. All persons included as beneficiaries under "existing laws" were manifestly intended to be embraced in the word "relatives," as employed in this Act; and it is only where there is no one answering any description found in those laws that this Act finds a place for operation.

A different construction would do violence to the evident intention of the Legislature and greatly disturb an established rule of descent which was expressly recognized and excepted in caption and body of the Act.

It is better to give the word "relatives" its ordinary meaning, and thereby preserve the unmistakable intent of the Legislature otherwise disclosed, than to adopt the narrower technical signification of the word, and in so doing defeat that intent. Indeed the cardinal rule of statutory construction—that which ascertains the legislative intent from a consideration of the entire Act—re-

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quires that the former course be pursued. The real intent disclosed by a consideration of an Act as a whole always prevails against the adverse technical import of particular words and phrases. *Rose v. Wortham*, 95 Tenn., 505, 508, 509, and citations.

It follows that the confessedly superior right of the defendant, the surviving husband, under the prior law was not impaired by the provisions of Chapter 34 of the Acts of 1885, and consequently that the decree in favor of the complainants must be reversed, and the bill dismissed at their costs.

This result renders it unnecessary to resolve the serious doubts raised by defendant's counsel in regard to the observance of constitutional requirements in the passage of the Act of 1885 by the House of Representatives.

Reverse and dismiss.

Cody v. Roane Iron Co.

CODY v. ROANE IRON CO.

(*Knoxville*. October 23, 1900.)

1. INFANT. *Authority of next friend.*

The next friend, by whom an infant's action for damages has been prosecuted to judgment, has no authority to receive the amount recovered, or to satisfy the judgment. That can be done by the regular guardian alone, during the infant's minority, and by the infant himself, after his majority.

Cases cited: *Miles v. Kaigler*, 10 Yer., 10; *Benton v. Pope*, 5 Hum., 392; *Barbee v. Williams*, 4 Heis., 522; *Green v. Perkins*, 3 Lea, 494.

2. SAME. *Satisfaction of judgment by next friend set aside.*

An admission of record of satisfaction of a judgment confessed in favor of an infant, made by his next friend, will be set aside in equity, at the suit of the plaintiff therein after his majority, and the judgment enforced in his favor, except as to a reasonable fee paid to his attorney for services rendered in obtaining the judgment.

3. SAME. *Judgment confessed in favor of, not set aside, when.*

Confession of judgment in favor of an infant will not be held to be conditioned upon a confession of satisfaction thereof by his next friend, although both are embraced in one and the same entry of record. And the confessed satisfaction will be set aside as illegal and unauthorized, while the confessed judgment will be permitted to stand and be enforced.

FROM ROANE.

Appeal in error from Circuit Court of Roane County. GEO. W. HENDERSON, J.

Cody v. Roane Iron Co.

CHAMBERS, McQUEEN & NICHOLAS and J. E. CASSADY for Cody.

WRIGHT & WRIGHT for Roane Iron Co.

CALDWELL, J. While a minor, William Cody, by next friend, sued the Roane Iron Co in the Circuit Court of Roane County, to recover damages for injuries which he alleged it had wrongfully and negligently inflicted upon his person. The defendant pleaded not guilty, and at the trial term the following final entry was made on the minutes of the Court, namely:

"William Cody, by next friend, v. Roane Iron Company.—Damages. Came the parties by their attorneys and thereupon defendant withdraws his plea filed in this cause, and confesses judgment in favor of the plaintiff for the sum of five hundred dollars damages, and the plaintiff accepts said sum in full of all demands sued for in this cause, as a final adjustment and compromise of all right of action. It is therefore considered by the Court that the plaintiff recover of the defendant said sum of five hundred dollars, together with all the costs of this cause, and plaintiff confessing to have received said sum of five hundred dollars, execution will only issue for the costs of this cause."

In reality \$450 of this recovery was by the defendant paid to the next friend, and the remaining \$50 to the attorney of the plaintiff, and no

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part of it was ever received by William Cody himself.

After attaining his majority he filed this bill to set aside the recited satisfaction and enforce the collection of the recovery mentioned, upon the ground that no part thereof had ever in fact been paid to him, and that the payment to others could not prejudice his rights.

The defense of the company was disclosed in its insistence that the recital of satisfaction is an integral and essential part of the Court's entry, which as a whole it says is a judicial contract, and, therefore, that if the satisfaction be vacated the recovery must likewise be annulled, and both parties restored to their original rights.

The Special Chancellor dismissed the bill, but the Court of Chancery Appeals reversed his decree and granted the relief sought as to the \$450 paid to the next friend.

The decree of the latter tribunal is correct.

The next friend of a minor has no legal authority as such to receive money due on the judgment he recovers. That right belongs alone to the regular guardian during the continuance of minority, or to the beneficiary himself after attaining his majority, and a payment made to the next friend will not operate as a satisfaction. *Miles v. Kaigler*, 10 Yer., 10; *Benton v. Pope*, 5 Hum., 392; *Barbee v. Williams*, 4 Heis., 522; *Green v. Perkins*, 3 Lea, 494, 495.

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Hence the payment made to the next friend of this complainant was and is, in legal contemplation, the same as no payment at all.

Such being true, the case now before the Court is one in which there is a recited satisfaction in the face of a judgment, where, in fact and in law, no satisfaction has been had, and that recitation, if allowed to stand, must inevitably preclude the complainant from the collection of his recovery, and thereby work a great wrong and fraud upon his confessed and adjudged rights.

It is the peculiar province and pride of a Court of Equity to vouchsafe all needed and appropriate relief in such a case.

It cannot be said against the complainant that he has been guilty of any wrong or fault at any point. The loss, if any, to be sustained through the payment already made, is due alone to the joint and illegal act of this defendant and the next friend, each of whom was charged with knowledge that such payment was wholly unauthorized in law; and it is better, if such be the ultimate result, that a participant in that act pay twice, than that the only person entitled to the money, and who is entirely innocent, should not be paid at all.

It is of no avail to the defendant that the recital of satisfaction forms a part of the entry in which the recovery was awarded. That fact does not require that the two shall be annulled

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or enforced together, and that neither shall be annulled or enforced separately. They are not so inseparably connected as that. Indeed, the adjudged recovery is in no sense dependent upon the recited satisfaction, but is wholly independent of it, and entirely complete without it. The recovery as such is based upon the preceding confession of liability, and not upon the subsequent confession of satisfaction.

If the entry be taken as a contract, judicial or otherwise, that confessed liability of the defendant to the plaintiff must obviously be regarded as the sole consideration for the recovery awarded. It would be utterly illogical and contradictory to say that the payment of a monetary obligation is the consideration supporting it, or that the judicial annulment of an alleged payment removes the consideration and thereby destroys the obligation; and yet there seems to be no greater foundation in reason for the contention that the recited satisfaction if this recovery is to be regarded as its consideration, and that the vacation of that recital really takes away that consideration, and should be held to nullify the recovery itself.

The \$50 paid to plaintiff's attorney in the suit at law was received by him as his fee for services rendered therein. Being reasonable in amount, and the attorney having a right to a lien on the recovery, this payment was valid, and operated as a satisfaction *pro tanto*.

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The Court of Chancery Appeals rightly vacated the recited satisfaction as to the remaining \$450 only, and pronounced a decree for that sum with interest from the date of the judgment.

Affirmed.

Bank v. Johnston.

BANK v. JOHNSTON.

(Knoxville. October 23, 1900.)

1. APPEAL. *Sufficiently granted, when.*

Although not granted in express terms, an appeal is sufficiently granted in contemplation of law where the final decree recites prayer for appeal, and gives time "to make and file appeal bond," which was accordingly done. (*Post*, pp. 522-525.)

Case cited: *Sellars v. Sellars*, 101 Tenn., 606.

2. SAME. *From decree of Court of Chancery Appeals.*

Appeal must be taken from decree of the Court of Chancery Appeals, not within ten days after the date of filing its opinion, but within ten days after entry of decree. (*Post*, pp. 524, 525.)

Act construed: Acts 1897, Ch. 131.

Case cited and distinguished: *Patterson v. Bank*, 101 Tenn., 511.

3. WRIT OF ERROR. *Bond for, not required, when.*

No additional bond is required upon prosecution of writ of error to reverse a decree of the Court of Chancery Appeals, and, therefore, the fact that such additional bond is filed out of time affords no ground for dismissal of such writ of error. (*Post*, p. 526.)

4. BILLS AND NOTES. *Taken in payment of pre-existing debt.*

The holder of a note, taken before maturity in payment of a pre-existing debt, is not a holder for value in due course of trade, in such sense that the maker's defenses and equities are cut off. (*Post*, pp. 526-530.)

Cases cited: *Craighead v. Wells*, 8 Bax., 38; *Richardson v. Rice*, 9 Bax., 290; *Kimbrow v. Lytle*, 10 Yer., 423; *Gosling v. Griffin*, 85 Tenn., 738; *Ferriss v. Tavel*, 87 Tenn., 386; *King v. Doolittle*, 1 Head, 77; *Anderson v. Douglass*, 1 Tenn. Ch., 442; *Bridges v. Robinson*, 2 Tenn. Ch., 725; *Rhea v. Allison*, 3 Head, 178; *Martin v. Bank*, 94 Tenn., 176.

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3. SAME. Failure of consideration.

A vendee, in possession under deed with covenants, who removes an incumbrance from the land, which constituted a breach of covenant, can defeat the collection of his notes given for the purchase price, and prevent enforcement of the vendor's lien therefor, only to the extent of the amount paid by him to remove the incumbrance. (*Post*, pp. 531-533.)

Cases cited: *Austin v. McKinney*, 5 Lea, 488; *Callis v. Cogbill*, 9 Lea, 137; *Buchanan v. Alwell*, 8 Hum., 516; *Barnett v. Clark*, 5 Sneed, 435; *Winfrey v. Drake*, 4 Lea, 293.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

TRAYNOR & SMITH for Bank.

W. L. EAKIN for Johnston.

McALISTER, J. This bill was filed to foreclose a deed of trust on a certain lot in Highland Park for the collection of thirty-one notes therein secured. The Chancellor dismissed the bill for reasons not necessary now to be recited.

On appeal the Court of Chancery Appeals modified the decree of the Chancellor so as to permit complainant to recover a personal judgment against the defendants on the notes, but refused to foreclose the deed of trust. The first question made in the Court of Chancery Appeals was that complainant's appeal should have been dismissed for

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the reason that the record fails to show that the appeal from the decree of the Chancellor was granted. The Court of Chancery Appeals, without deciding this question, proceeded to consider the case on its merits, and rendered a final decree. Defendant's counsel renews his motion in this Court to dismiss the appeal for the reason already stated.

On the subject of the appeal the record of the Chancery Court recites, viz.: "From the judgment and decree rendered by this Court on the sixth day of October, 1899, in the above cause, the complainant, the Bank of Charleston, comes and prays an appeal *in toto* to the next term of the Supreme Court to be held at Knoxville on the second Monday in September, 1900, and the complainant being a nonresident is allowed thirty days in which to make and file an appeal bond." It will be observed it is not expressly stated in this entry that the prayer for an appeal was granted. The complainant, however, executed bond on October 23, 1899. It is recited in the bond that it is executed upon an appeal prayed from a decree of the Court rendered at the October term, 1899, to the next term of the Supreme Court to be held at Knoxville, etc., which to it was granted on bond and security being given as required by law. The question presented is whether upon these recitals it appears that the appeal was granted.

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In the case of *Sellars v. Sellars*, 17 Pickle, 606, it appeared that the entry of appeal failed to show that it had been granted. The contention of defendant was that the recital in the appeal bond that the appeal had been granted was sufficient. We held this position untenable. We had previously held, in an unreported case at Jackson, that a recital in the bill of exceptions that an appeal had been granted was insufficient.

The case at bar is distinguished from the two cases cited in this, that the entry of appeal shows that an appeal was prayed, and the Chancellor allowed the defendant, a nonresident, thirty days in which to make and file the bond. We think that the allowance of time by the Chancellor for the defendant to give bond is equivalent to a recital that the appeal was granted, for otherwise the Chancellor would certainly not have given time to make the appeal bond. So that we hold that the appeal in this case was granted.

Complainant now moves to dismiss the defendant's appeal from the decree of the Court of Chancery Appeals upon the ground that it was not taken within ten days. The opinion of the Court of Chancery Appeals was filed on the sixteenth day of June, 1900, but no decree was entered until September 1, 1900. In the meantime, to wit, on the twenty-third of August, 1900, the complainant filed a petition to rehear. On the first of September thereafter the petition was

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in all respects denied except that the Court ordered a sale of the five-twelfths interest of defendant, Minnie K. Lowe, in the property attached. On that day, to wit, September 1, the decree in the cause was for the first time entered, although the opinion of the Court was filed June 16, 1900. This was the first opportunity that was presented to the defendants to appeal, since no decree prior to that time had been entered by complainant, and the appeal of defendants was accordingly incorporated in that decree. The complainant's motion to dismiss defendants' appeal is based upon the idea that it should have been taken within ten days from the filing of the original opinion. Counsel cite in support of this position *Patterson v. Bank*, 17 Pickle, 511, but that case only holds that a petition to rehear must be presented within ten days from the filing of the opinion, and not within ten days from the entry of the decree. The time for appealing, however, is a different matter, and is regulated by the statute creating the Court of Chancery Appeals and the amendments to said Act. The Act of 1897, Chapter 131, amending the Act creating the Court of Chancery Appeals, provides that "hereafter no writ of error or appeal in the nature of a writ of error shall be taken to the Supreme Court from any decree of the Court of Chancery Appeals after the expiration of ten days from the decree of the Court of Chancery Appeals."

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There is still another question of practice arising upon the record. It is a motion interposed by defendant to dismiss complainant's writ of error. It appears that complainant, on the seventh of September, filed the record for writ of error. On the twenty-first of September complainant filed with the Clerk of this Court a bond for writ of error. The ground of defendant's motion to dismiss the writ of error is that complainant's bond should have been given within ten days from the entry in the Court of Chancery Appeals, which, as already stated, was September 1, and the bond for writ of error was not filed with the Clerk until the twenty-first of September. The statute expressly provides that an appeal or writ of error to the Supreme Court may be prosecuted without any additional security. So that the bond filed with the Clerk on the twenty-first of September was wholly unnecessary, and the motion of defendant to dismiss the writ of error, because bond was not given within the ten days, is not well made.

Passing now to the merits of the case, we have already stated that the bill herein was filed to foreclose a deed of trust for the collection of thirty-one notes therein secured. The facts as found by the Court of Chancery Appeals are, that on the eleventh of November, 1890, Mrs, Cordelia Kershner conveyed lot No. 47 in Highland Park to one Fred Ferger, in trust to secure

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payment of a note for \$4,000 executed by Mrs. Kershner to the Merchants and Mechanics Building and Loan Association of Chattanooga. At that time the said Ferger was secretary of the association. This deed of trust was duly recorded on the fifteenth of July, 1891. Mrs. Kershner, for the consideration of \$1,800, conveyed by fee simple deed the lot in question to Matilda C., Minnie K., and Frances P. Johnston. Twenty-five dollars was paid in cash, one note executed for \$17, and seventy-nine notes for \$15 each, and the balance of the said purchase price, to wit, \$573, was to be paid to the Merchants and Mechanics Building and Loan Association aforesaid. This deed was duly acknowledged and registered. On the same day of the execution of the deed, the purchasers, the Misses Johnston, executed a deed of trust on said lot to A. W. Gaines, trustee, for the purpose of securing their eighty purchase notes for \$15 each, executed to Mrs. Kershner. This instrument was also duly acknowledged and recorded. On the fifth of August, 1895, E. C. Sharon, who was at that time secretary of the building and loan association, foreclosed the deed of trust which Mrs. Kershner had executed to Fred Ferger, trustee and secretary, for the benefit of the said building and loan association. At said sale the association became the purchaser of the lot at the price of \$300, and a deed was executed to it by Sharon, trustee, which was duly registered.

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The association, on same day it purchased the lot, sold it to the said Misses Johnston for the sum of \$400.

The Court of Chancery Appeals further finds that the complainant, the Bank of Charleston, acquired the notes executed by the Misses Johnston to Mrs. Kershner in part payment of an indebtedness of several thousand dollars due from Mrs. Kershner to the bank.

That Court, in the opinion of the majority, further finds there is no evidence that the Misses Johnston failed to pay to the building and loan association the sum of \$573 which they assumed to pay as a part of the purchase money for the lot purchased from Mrs. Kershner, and that said sum must be considered as paid.

Further, that Court held that complainant bank was affected with knowledge, at the time it took the notes, that a deed of trust rested upon the lot No. 47 prior to the deed of trust which the Misses Johnston had executed to Gaines to secure the building and loan association.

The Court of Chancery Appeals then proceeds to state the law applicable to the facts found by them. That Court states "the bank took said notes as an innocent holder for value in due course of trade, and before their maturity, without notice of any equities against them. Under the proof it took them before maturity. It paid value for them in a sense, in that it took them

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in satisfaction in part of a debt due it by Mrs. Kershner."

Said that Court: "Whether a person who receives, before maturity, negotiable paper in payment of or as collateral security for a pre-existing debt is a holder for value in the sense of the law merchant is a question on which Courts have differed. A number of cases seem to hold that he is." The Court then cites eighteen cases as sustaining that proposition. "Other cases," continues the Court, "seem to hold that he is not a holder for value, and several of our Tennessee cases point very strongly in this direction." Citing *Craighead v. Wells*, 8 Bax., 38; *Richardson v. Rice, Styx & Co.*, 9 Bax., 290. That Court again states that the complainant bank took the notes and credited their face value on the indebtedness of Mrs. Kershner to it, and then continues, viz.: "Under the authorities from this State, cited, it is a matter of grave doubt, the notes having been taken in payment of a pre-existing debt, whether the complainant bank is a holder for value in due course of trade."

We do not concur with the Court of Chancery Appeals in the doubt expressed as to the law governing this case. We are clearly of the opinion that upon the facts found the complainant bank is not a holder for value in due course of trade in the sense of the law merchant. That Court distinctly finds that these notes were taken

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in part satisfaction of an indebtedness amounting to several thousand dollars due the bank by Mrs. Kershner. In *Craighead v. Wells*, 8 Bax., 38, it was held by this Court that a note taken in payment of a pre-existing debt is not received in due course of trade and is subject in the hands of the person so receiving it to all equities against it. In *Kimbro v. Lytle*, 10 Yer., 423, it was said: "Due course of trade is where the holder has given for the note his money, goods, or credit, or has on account of it incurred some loss or liability." So in *Richardson v. Rice, Styx & Co.* it was held that negotiable paper transferred as collateral security for subsisting indebtedness and future advances, is subject to all equities then existing, and the maker is protected if he has paid the note to the rightful holder before the transfer, though the transfer was before maturity. *Gosling v. Griffin*, 1 Pick., 738; *Ferriss v. Tavel*, 3 Pick., 386; *King v. Doolittle*, 1 Head, 57; *Anderson v. Douglas*, 1 Tenn. Ch., 442; *Bridges v. Robinson*, 2 Tenn. Ch., 725; *Rhea v. Allison*, 3 Head, 178; Meigs' Reports, 155; *Kimbro v. Lytle*, 10 Yer., 428; *Martin v. Bank*, 10 Pick., 176.

We are aware that this rule has been changed by Article 2, Section 35, and Article 4, Section 52 of the general Act relating to negotiable instruments, approved April 6, 1899, but the transactions herein involved occurred at a time long

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anterior to the passage of said Act, and are not in any way affected thereby. What, then, are the equities against said notes?

It is insisted that the consideration of said notes had failed in this, that at the time Mrs. Kershner sold lot No. 47 to the Misses Johnston, there was an outstanding mortgage on the lot, in favor of the building and loan association, for \$4,000, due from Mrs. Kershner. On this subject the Court of Chancery Appeals find that Mrs. Kershner executed to them a fee simple deed covenanting that the land was unincumbered, when, in fact, the legal title was not in her, but in a trustee, to whom it had been conveyed to secure a note of hers for \$4,000 to a building and loan association. That Court held that Mrs. Kershner, having no title, her covenant of seizin was broken when made, and, therefore, broken prior to the assignment of the notes executed by the Misses Johnston to the complainant bank. That Court further held that the title to the lot having failed, there was no consideration for the notes and that complainant bank was not entitled to a lien on the lot. In this holding we think the Court of Chancery Appeals was in error. In our opinion, upon the facts found by that Court, the purchase of the lot by the Misses Johnston from the building and loan association, the first mortgagee, for the consideration of \$400, amounted simply to the purchase of an outstand-

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ing title to perfect their own title acquired from Mrs. Kershner, and, as a matter of law, this purchase inured to the benefit of the vendor or the assignee of the party entitled under the trust deed executed by the Misses Johnston to Gaines • to secure the purchase money notes. It is said, however, by the Court of Chancery Appeals, that Mrs. Kershner, the vendor of the Misses Johnston, was insolvent, and the law is, that vendees in possession may resist the payment of their purchase money notes when the title conveyed is defective or fails and their vendor is insolvent. *Buchanan v. Alwell*, 8 Hum., 516; *Barnett v. Clark*, 5 Sneed, 435; *Winfrey v. Drake*, 1 Lea, 293. But this rule would have no application in a case like this. When the purchaser in possession has bought in the outstanding title or removed the incumbrance and now enjoys a perfect title to the lot, the rule in such a case is, that where a vendee is in possession of land, either by deed or contract to convey, and has not been evicted, but purchases in a better outstanding title or removes an incumbrance, it inures to the benefit of the vendor or his assignee, and all the vendee can ask is to be reimbursed his outlay in obtaining the title, not exceeding the value of the land. *Austin v. McKinney*, 5 Lea, 488; *Callis v. Cogbill*, 9 Lea, 137.

The decree of the Court of Chancery Appeals will be reversed and a decree entered here in

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favor of complainant for the amount due on said notes, crediting them by the sum of \$400 and interest from August 5, 1895, amount paid by the Misses Johnston in removing the incumbrance on said lot or acquiring title thereto, and for the payment of this sum a lien will be declared on the lot in controversy.

The costs of the appeal will be paid by defendants.

Rook v. Godfrey.

ROOK v. GODFREY.

(Knoxville. October 27, 1900.)

1. FORCIBLE ENTRY AND DETAINER. *Not maintainable, when.*

Unless plaintiff was in possession at date of defendant's entry on the land, he cannot maintain forcible entry and detainer.

Cases cited: Greer v. Wroe, 1 Sneed, 247; Elliott v. Lawless, 6 Heis., 129; Chamberlain v. Coal & Coke Co., 92 Tenn., 21.

2. SAME. *Same.*

A party who has been put in possession of land by an officer, under a writ of possession, cannot be ousted by forcible entry and detainer.

Case cited: Scott v. Newsom, 4 Sneed, 457.

FROM CUMBERLAND.

Appeal in error from Circuit Court of Cumberland County. W. T. SMITH, J.

J. J. TRACEY, CYRUS SIMMONS, NOBLE SMITHSON, and JOHN H. COTNER for Rook.

J. F. McNUTT, R. E. ROBINSON, L. D. SMITH, and D. L. LANDSDEN for Godfrey.

CALDWELL, J. Action of forcible entry and detainer; demurrer to evidence of the plaintiffs sustained, and appeal in error by them.

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The action of the trial Judge was correct, for two reasons, (1) because the plaintiffs failed to show that they were in the possession of the land when the defendants entered (*Greer v. Wroc*, 1 Sneed, 247; *Elliott v. Lawless*, 6 Heis., 129; *Chamberlain v. Coul and Coke Co.*, 92 Tenn., 21), and (2) because the defendants were put in possession by the Sheriff under writs of possession issued from the Chancery Court. *Scott v. New-som*, 4 Sneed, 457.

Let the judgment be affirmed.

Lafollette v. Road Commissioner.

LAFOLLETTE v. ROAD COMMISSIONER.

(*Knoxville*. October 27, 1900.)

1. **APPEAL.** *Not dismissed for want of bond, when.*

Appeal will not be dismissed for want of bond where one is tendered before the motion to dismiss on that account is disposed of. (*Post*, p. 538.)

2. **SAME.** *Lies by Road Commissioner.*

A Road Commissioner is an interested party to a contest over the opening of a public road, in such sense that he may prosecute an appeal from the judgment of the County Court refusing to sustain his action in opening the road. (*Post*, pp. 538, 539.)

Code construed: §§ 1621, 1625 (S.).

3. **SAME.** *What constitutes record on appeal from County Court to Circuit Court.*

A transcript, not the original papers, constitutes the record to be sent up on appeal to the Circuit Court from a judgment of the County Court, and it is not necessary that a seal be placed to the certificate to the transcript. (*Post*, p. 539.)

Code construed: §§ 1625, 4882, 4885 (S.); §§ 3867, 3870 (M. & V.); §§ 3150, 3153 (T. & S.).

4. **NOTICE.** *Waiver of.*

Notice of the contemplated opening of a public road is waived by the landowner's appearing and making defense on the merits in the Courts. (*Post*, p. 539.)

5. **PUBLIC ROADS.** *Objection that a commissioner was not a freeholder immaterial.*

The objection that one of the commissioners for the laying out of a public road was not a freeholder becomes immaterial in the Circuit Court when the contest is tried *de novo*. (*Post*, pp. 539, 540.)

Case cited: *Patton v. Clark*, 9 Yer., 269.

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6. SAME. *Contest heard at first term.*

A road contest stands for trial in the Circuit Court, on appeal, at the term on the first day of which the transcript was filed. (*Post*, p. 540.)

FROM CAMPBELL.

Appeal in error from Circuit Court of Campbell County. W. R. HICKS, J.

J. HENDERSON REID, and JOUBOLMON, WELCKER & HUDSON for LaFollette.

J. E. JOHNSTON for Road Commissioner.

WILKES, J. This is a proceeding to open a public road through the premises of Mrs. Susan C. Lafollette, in the Fifth Road District of Campbell County.

The Commissioner, with two other persons selected by him, viewed the road and laid it off, and Mrs. Lafollette's damages were assessed by them at \$100. Mrs. Lafollette appealed to the Quarterly County Court of Campbell County, where the matter was informally submitted to that body under the proposition made by the Judge of that Court. This proposition was in the following words and figures:

"All who believe that the action of the Road Commissioner in this matter is legal and that

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the road should be opened as laid out by him and his jury of view, as your names are called say 'aye'; those who think otherwise will say 'no'."

The vote on this proposition stood nine ayes and thirteen noes. This was treated as a final judgment of that Court refusing to open the road, and the Road Commissioner appealed to the Circuit Court. In that Court it was tried on the merits by the Judge without a jury and he made the following finding and judgment:

"1. The public interest and welfare demand the opening of the road as laid off by the Commissioner and jury of view.

"2. The amount of the damages therefor is \$100.70, which sum the defendant is entitled to demand and receive, and which sum will be paid out of the County Court funds."

And a final judgment was accordingly entered, and Mrs. Lafollette has appealed and assigned errors.

It is said that it was error to refuse to dismiss the appeal of the Road Commissioner because he gave no appeal bond. The statute does not require such bond in express terms, but if such bond was necessary the omission was supplied and cured by the Commissioner giving bond in the Circuit Court when the motion was made that the appeal be dismissed.

It is said that the Road Commissioner is not

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an interested party in the eye of the law. Shannon, §§ 1621, 1625. This is not well assigned. He was perhaps the only person who could appeal, the action of the County Court having been adverse to his action. The petitioners are not required to appeal. Indeed, the Commissioner may act without any petition. The County Court could not appeal from its own action.

It is said the original papers were not sent up to the Circuit Court. This is not required. Upon an appeal from the action of the jury of view the papers shall be sent to the County Court. Shannon, § 1625. Upon appeal to the Circuit Court from the County Court a transcript, and not the original papers, should be sent up. Shannon, § 4882. It was not necessary that the seal of the County Court be placed to the certificate to the transcript. Shannon, § 4885.

It is said Mrs. Lafollette had no notice of the contemplated opening of the road. The report of the Commissioner recites that notice was given according to law, but whether she did or not, she came into the County Court on appeal, and contested the opening of the road on the merits and also in the Circuit Court contested the merits of the entire case, and the trial there was *de novo*.

It is said one of the Commissioners was not a freeholder. The affidavits made by both of them state that they were freeholders of the Fifth Dis-

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trict. But this is immaterial, as the cause was heard *de novo* in the Circuit Court. Shannon, § 4884; *Patton v. Clark*, 9 Yer., 269.

The Court did not err in trying the case at the same term the papers were returned and filed. The transcript was delivered to the clerk of the Circuit Court on the first day of the term to which the appeal was taken, and it was triable at that term.

There is no reversible error in the proceeding, and the judgment is affirmed with costs.

Carson v. Peterson.

CARSON v. PETERSON.

(Knoxville. October 27, 1900.)

1. PRINCIPAL AND SURETY. *Surety liable before stayor of judgment, when.*

Where a surety actively co-operates with his principal in procuring stay of a judgment against both, he is liable before the stayor.

2. SUPREME COURT. *Will not reverse upon question not made below.*

This Court will not reverse upon a question not made or suggested in the lower Court.

Case cited: Jones v. Cullen, 100 Tenn., 24.

FROM MONROE.

Appeal in error from Circuit Court of Monroe County. JAMES G. PARKS, J.

McCROSKEY & McCROSKEY for Callaway.

T. W. PEACE for Peterson.

WILKES, J. This is a petition for certiorari and supersedeas brought by a surety from a judgment by motion before a Justice of the Peace in favor of the stayor of execution.

The allegation is that the judgment was stayed

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by Peterson at the instance of Carson, the principal, without the assent of the surety, Callaway, and the stayor is therefore liable before the surety.

There was a motion to dismiss, which was overruled, and the cause was then heard by the Court without a jury, and the petition was dismissed and judgment was rendered against the petitioner and his surety for the amount of the debt, interest, and costs. And the petitioner and surety on his certiorari bond have appealed to this Court and assigned errors.

It is said the Court erred in holding that Peterson became stayor by the procurement and consent of the surety, Callaway. The trial Judge was requested to reduce his finding to writing, and did so. The Court found that Callaway not only consented to the stay, but was active in procuring it, and his finding is well supported by the testimony.

It is next said that the judgment by motion is defective in that it does not recite on its face that Peterson stayed execution for Callaway. It does recite that the judgment was against Carson as principal and Callaway as surety, and was stayed by Peterson, but does not in so many words state that it was stayed at Peterson's request. It is stated that this objection was not made in the Court below and is made for the first time in this Court. We do not find that

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it is mentioned by the trial Judge in disposing of the case nor in the petition for certiorari, and we must infer it was not made, or if made was not insisted on in that Court, and it cannot now be set up to put the trial Judge in error. It must have been made in the Court below, to constitute it reversible error in this Court. *Jones v. Cullen*, 16 Pick., 24.

This disposes of all the real questions presented in the case, and it results that the judgment of the trial Judge is affirmed with costs.

Barr v. Railroad.

BARR v. RAILROAD.

(*Knoxville.* October 27, 1900.)

1. NEW TRIAL. *Motion for, not essential, when.*

Motion for new trial is not essential to a review of the facts on appeal in a law cause tried by the Court without intervention of a jury. (*Post*, p. 545.)

Case cited: *Lancaster v. Fisher*, 94 Tenn., 222.

2. BILL OF EXCEPTIONS. *Not essential, when.*

Bill of exceptions is not essential to a review by this Court, on appeal, of the lower Court's action on a demurrer to the evidence. The demurrer must incorporate the evidence, and, when filed, becomes part of the record without more. (*Post*, pp. 545, 546.)

Cases cited: *Hopkins v. Railroad*, 96 Tenn., 410; *Summers v. Railroad*, 96 Tenn., 459; *Artenberry v. Railroad*, 103 Tenn., 266; *Mitchell v. Railroad*, 100 Tenn., 329.

3. NEGLIGENCE. *Contributory, that defeats action.*

If both parties are guilty of fault or negligence that contributes directly and proximately to cause plaintiff's injury, he cannot recover. (*Post*, pp. 546, 547.)

Case cited: *Saunders v. Railroad*, 99 Tenn., 135.

4. SAME. *Same. Case in judgment.*

Where the plaintiff, an employee in woolen mills, in passing from her place of employment to dinner, found defendant's train obstructing the street crossing, in violation of a city ordinance, and in attempting to cross over the train without permission, instead of waiting for the train to move, became frightened by a sudden and unexpected jerk of the train, and

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jumped from the car, injuring herself, she cannot recover, as her negligence contributed with defendant's directly and proximately to the injury. (*Post*, pp. 546, 547.)

FROM M' MINN.

Appeal in error from the Circuit Court of Mc-Minn County. J G. PARKS, J.

V. C. ALLEN, and IVENS, GASTON & MADISON for Barr.

BURKETT & MILLER, and HARRISON & ROBERTS for Railroad Company.

CALDWELL, J. Action of damages for personal injuries; demurrer to evidence sustained and suit dismissed, and appeal in error by plaintiff.

1. The defendant's motion to affirm because no motion for new trial was made below, is overruled. A motion for a new trial is not a prerequisite to an appeal in error, when the case is tried by the Court without the intervention of a jury, as was done in this instance. *Lancaster v. Fisher*, 94 Tenn., 222.

2. The motion to affirm because there is no bill of exceptions is likewise overruled. Every demurrer to the evidence must incorporate the evidence (*Hopkins v. Railroad*, 96 Tenn., 410; *Sun-*

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mers v. Railroad, Ib., 459; *Artenberry v. Railroad*, 103 Tenn., 266), and when filed the demurrer in full becomes a part of the record without more. Hence a bill of exceptions is not necessary to a review of such demurrer in this Court. *Mitchell v. Railroad*, 100 Tenn., 329.

3. The plaintiff's assignment of error upon the action of the trial Judge in sustaining the defendant's demurrer to the evidence is not well founded. The evidence does not disclose any legal responsibility on the part of the defendant for the injuries sued for. The substance of the evidence, with proper legal deductions and inferences therefrom, is that the plaintiff, when going from her work at the woolen mills at Sweetwater to her dinner, found one of the defendant's freight trains standing on the track across the street on which she was rightfully accustomed to travel; that, rather than take the risk of being so delayed as to be tardy in returning to her afternoon task, she attempted, without permission or notice, to cross the obstructing train after her companion, and, while passing over one of its flat cars was, by its sudden and unexpected movement, frightened and caused to jump to the ground in the direction in which she was going, thereby breaking one of her legs and sustaining the injuries for which she sues; that the defendant, in so obstructing the street for the period of fifteen minutes violated an ordinance of the

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town and became subject to a municipal fine of from \$2 to \$50.

Thus a deplorable misfortune is undoubtedly revealed, but it is the product of the concurring negligence of the plaintiff and the defendant. The defendant's negligence in obstructing the plaintiff's rightful passage upon the public highway did not justify her negligence in attempting to pass over the train. They were both in fault, and the fault of one concurred directly and proximately with that of the other in producing the injury. It is not a case of proximate negligence on the part of the defendant and remote negligence on the part of the plaintiff, in which the latter's fault goes merely in mitigation of damages; but it is a case of proximate negligence on the part of both, in which the latter's fault absolutely bars her action. *Saunders v. City and Suburban Railroad Co.*, 99 Tenn., 135, and citations.

Affirmed.

Burkett v. Insurance Co.

BURKETT v. INSURANCE Co.

(*Knoxville*. October 27, 1900.)

1. FIRE INSURANCE. Amount of loss.

The amount of the loss for the burning of an insured building covered by a fire policy providing that the loss shall be "estimated according to the actual cash value of the property at the time of the fire, which shall in no case exceed what it would cost to replace the same," is the "gross value of the building less the value of the portion saved, the latter value to be estimated on the basis of the use of the saved portion, at the same place and for the same purpose as originally used."

2. SAME. Same.

That provision in a fire policy which declares that the loss or damage shall in no case exceed the cost of replacing the property destroyed, is not obnoxious to the statutory provision that requires all insurance companies to pay their policy holders the full amount of the loss sustained upon the property insured by them, provided that amount does not exceed the amount of the policy, and declares all stipulations in the policy to the contrary null and void.

Act construed : Acts 1893, Ch. 107.

FROM M' MINN.

Appeal from the Chancery Court of McMinn County. T. M. McCONNELL, Ch.

BURKETT & MILLER for Burkett.

GREEN & SHIELDS for Insurance Company.

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WILKES, J. This is an action upon a fire insurance policy. The Chancellor gave judgment for \$800, the amount of the policy, and the company appealed. The Court of Chancery Appeals gave judgment for \$690 and both parties appealed, but the complainant alone has assigned errors, while the defendant company insists there is no error in the decree of the Court of Chancery Appeals.

The contention is narrowed down in this Court to what is the proper construction of the following clause in the policy: "The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the fire, which shall in no case exceed what it would cost to replace the same."

The Court of Chancery Appeals report as a fact that using the foundation of the building, which was not destroyed, together with the platform around the building, some iron stays and pipes, which were not consumed, that the building could be replaced for \$690.

If, however, the building should not be replaced on its original site, the foundation, stays and pipes would not be worth so much, and in that event the loss would amount to \$800, net.

The main contention is that this provision in the policy limiting recovery to the cost of replacing the property, is an attempt to evade the provisions of Chapter 107 of the Acts of 1893, which is as follows:

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“Insurance companies shall pay their policy holders the full amount of loss sustained upon property insured by them, provided said amount of loss does not exceed the amount of insurance expressed in the policy, and all stipulations in such policy to the contrary are and shall be null and void.”

There is no doubt but that this statute becomes a part of and must be read into every policy of fire insurance, and must be given the effect intended. According to its provisions the insured has the right to recover the full amount of loss sustained, provided it does not exceed the amount of the policy. What is the loss sustained in this case? If the entire structure had been destroyed, including the foundation, platform, iron stays and pipes, the loss would, on the finding of the Court of Chancery Appeals, have amounted to \$840, and in that event complainant could collect the whole policy. With these not consumed, the loss would be less by their value. How is that value to be estimated? The company insists that it must be on the basis of using them at the same place and in the construction of a similar building, while the complainant insists that it must be on the basis of not using them at the same place and in a similar building, but at a different place or not at all, at his option.

We think the former contention must prevail

Burkett v. Insurance Co.

under the language of the policy. Under its terms the agreement of the parties contemplates the replacing of the structure and the cost of doing so. It does not stipulate to indemnify the insured against loss if they are not so used or are removed to and used at another place.

The full amount of the loss is the gross value of the building less the value saved, that value to be estimated on the basis of its use at the same place and for the same purpose as originally used.

We may suppose the roof of the house destroyed by fire while the walls and other parts are left intact, certainly the rule would not require the full value of the building to be paid without credit for the portions left standing and to be used in replacing the structure.

We see no error in the decree of the Court of Chancery Appeals, and it is affirmed.

Railroad v. Ferguson.

RAILROAD v. FERGUSON.

(*Knoxville.* November 3, 1900.)

1. **NAVIGABLE STREAM.** *What is.*

A river is navigable which is occasionally, during good tides, used for steamboat navigation, although its navigability has not been declared or recognized by statute, State or Federal. (*Post*, pp. 553-556.)

Cases cited: *Elder v. Burrus*, 6 Hum., 367; *Stuart v. Clark*, 2 Swan, 9; *Sigler v. State*, 7 Bax., 493.

2. **SAME.** *Power of State over.*

The State Legislature has undoubted power to authorize the obstruction of navigable streams situate entirely within the territorial limits of the State—*e. g.*, by the construction of railroad bridges over same. (*Post*, pp. 556, 557.)

3. **SAME.** *Authority to build bridges over, construed.*

Authority conferred upon a railroad company by its charter to "build bridges" does not give the right to obstruct navigable streams by permanent structures of this character. (*Post*, pp. 557-560.)

Cases cited: *Cantrell v. Railroad*, 90 Tenn., 638; *Railroad v. Hicks*, 5 Sneed, 427.

4. **SAME.** *Right to obstruct, not acquired by prescription.*

A prescriptive right to obstruct a navigable stream—*e. g.*, by an unauthorized railroad bridge—cannot be acquired by the maintenance of the obstruction for any length of time, however great. (*Post*, pp. 560, 561.)

Case cited: *Elkins v. State*, 2 Hum., 542.

5. **SAME.** *Question of navigability one of fact for jury.*

The question of navigability of a stream is one of fact for the jury. (*Post*, p. 562.)

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6. **PRESCRIPTION.** *Right by, must be specially pleaded.*

Right by prescription, when relied on as a defense, must be specially pleaded. It cannot be shown under the general issue. (*Post*, pp. 560, 561.)

7. **SAME.** *Not error to charge statutes relating to, when.*

It is not error for the Court to charge the statutes relating to the navigability and obstruction of navigable streams, especially when it is clear that the stream in question is navigable independently of statute. (*Post*, p. 561.)

Code construed: §§ 1808, 6869 (S.); §§ 1513, 5746 (M. & V.); §§ 1299, 4913 (T. & S.)

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

MAYFIELD, SON & AIKEN and COOKE, SWANEY & COOKE for Railroad.

GARNETT ANDREWS, S. B. SMITH, and CHAMP & ANDREWS for Ferguson.

BEARD, J. The defendant in error was the owner of a steamboat built for the purpose of and used by him in plying the Hiwassee river when there was sufficient depth of water.

In his declaration filed in this cause it is averred that plaintiff in error maintained a bridge over this stream so low as greatly to interfere with its navigation, and that by reason of such improper construction his steamboat was "wrong-

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fully, unlawfully, and unjustly prevented from navigating said stream and from reaching its destination in time, to his great and special damage and injury." For the loss sustained in this alleged unlawful detention this action was brought.

The railway company first demurred to the declaration. This demurrer was overruled by the Court, but as no complaint is made of the action of the trial Judge in this respect, it is unnecessary to set out the grounds of demurrer. Pleas—six in number—were then filed. The first of these was the plea of not guilty. The second, third, and fourth, and fifth pleas set up as a bar to the action, in one form or another, a prescriptive right to maintain the bridge, because the railway company and its predecessors in title had built and maintained it or similar structures in the same position for more than twenty years, and more than fifty years before the injury complained of. The sixth plea was that of the three-years statute of limitations. The pleas referred to above as raising the prescriptive right of the defendant to maintain the bridge in its then altitude were demurred to and the demurrer was sustained. So the cause proceeded to trial upon the two pleas, one of not guilty and the other the statute of limitations, and resulted in a verdict and judgment for the plaintiff.

From the agreed statement of facts it appears that the original right to erect and maintain a

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bridge at the point in question is found in a charter granted by the Legislature of Tennessee to the Hiwassee Railroad Company in 1836, and in the exercise of this right that company, as a part of its railroad, constructed a bridge between "Calhoun in McMinn County and Charleston in Bradley County," at some time prior to the year 1845; and that, under legislative authority subsequently conferred, all the corporate rights, franchises, and property of this company and of its various successors passed ultimately into the present plaintiff in error. It further appears that its predecessors in title and the present owner, the plaintiff in error, "have continuously and successively rebuilt and maintained said bridge . . . upon and at the site of its original location, and that said railroad bridge has not, since its original erection, at any time been lowered to a less height above the river than was the original bridge," and, in fact, "that the bridge now in controversy is somewhat higher than was the original structure."

It also appears "that in the spring season and winter, when there is a good tide in the river, a light draught steamboat now and then runs up the river to the mouth of the Ocoee river, in Polk County, Tennessee, some fifteen or twenty miles by river above Charleston," and that at high tide such a boat can run up to a point some twenty-five or thirty-miles above Charleston.

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The case was tried upon this agreed statement of facts and evidence of the additional fact that at a certain period within three years before the institution of this suit, when the river was swollen to a considerable but not unprecedented degree by a heavy rainfall, the steamboat of the defendant was detained while transporting a cargo of valuable freight by the obstruction of this bridge, to the loss of its owner.

On this record it is clear that the Hiwassee was a navigable river within the definition of such a stream, as frequently repeated by this Court. *Elder v. Burrus*, 6 Hum., 367; *Stuart v. Clark*, 2 Swan, 9; *Sigler v. State*, 7 Bax., 406.

The fact that it has never been declared a navigable river is immaterial, as it does not require legislative sanction of either Congress or of the State to give a stream navigable status. *Little Rock Railroad v. Burke*, 39 Ark., 403.

The stream is entirely within the territorial limits of Tennessee and it was within the power of the Legislature of the State to authorize the construction of this bridge, notwithstanding it might work inconvenience to the right of navigation. *Commonwealth v. Breed*, 4 Pickering, 460; *Depew v. Trustees of W. & E. Canal*, 5 Ind., 8.

The rule as laid down by Judge Cooley in his work on Constitutional Limitations, p. 592, is that "if the stream is not one which is sub-

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ject to the control of Congress, the State law permitting the erection cannot be questioned on any ground of public inconvenience. The Legislature must always have power to determine what public ways are needed and to what extent the accommodation of travel over one way must yield to the greater necessity of another."

The question, therefore, in such a case is, Has the Legislature, while giving authority to build a bridge, made it lawful for the company so to construct it as to prove, either all the time or at recurring periods, an obstruction to craft adapted to its navigation? This question plaintiff in error insists is answered by its charter. Upon referring to that, however, it is found that the authority thus given is simply "to build bridges." The character of such bridges is not defined nor are the names of the streams mentioned to which this authority is to be applied. Can there, then, be implied from this general authority "to build bridges" the power to so construct them as either to destroy or else to interfere seriously with the passage of water craft upon such internal streams as may be crossed by the company in the extension of its line of road? We think not. The State is interested in the preservation of the natural ways of communication between its different and separated communities, which may greatly serve their convenience and comfort, as well as in the building and operation of new and artificial

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lines. In the absence of express provisions it will not be assumed that it was the purpose of the Legislature to authorize the construction of a permanent structure over one of its streams susceptible of use for navigation, which would seriously impede the enjoyment of that use. It would be otherwise as to obstructions which were temporary in character and absolutely necessary in the erection of a lawful structure. While during their existence they might work inconvenience to the public in depriving it of the full use of the stream, yet if this obstruction was necessary to the exercise of the granted right, it would not be declared illegal. *People v. Horton*, 60 N. Y., 610; *Cantrell v. Railroad*, 90 Tenn., 638.

In *Hamilton v. Vicksburg, Shreveport & Pacific R. R. Co.*, 119 U. S., 280, it is said: "In the case at bar no specific directions as to the form and character of the bridges over the streams on the line of the railroad were prescribed by the Legislature of the State. The authority of the company to construct them was only an implied one, from the fact that such structures were essential to the continuous construction of the line. Two conditions, however, must be deemed to be embraced within this implied power; one that the bridges should be so constructed as to insure safety to the crossing of the trains, and the other that they should not interfere unnecessarily with the navigation of the streams."

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In *Cantrell v. Railway Co.*, supra, as in the foregoing case, the right to erect the bridge in question rested on implication from the State's grant of authority to build and operate the particular line of railroad. In that case the complaint was that the railway company, in the erection of a bridge over Clinch river, had obstructed its navigation by the use of temporary trestle and other structures, and this Court said such obstruction was not unlawful if it covered no more of the stream and was no longer continued than the necessity of the case demanded and required.

The charter right on which plaintiff in error rests for its defense in this case is not higher or greater than was that of the corporations involved in these last two cases; in this the right "to build bridges" is expressly given, while in those it arose by necessary implication. In neither was the form or character of such bridges prescribed. But as the "authority to throw a bridge over a navigable stream is an exception from the general law, by which it is forbidden, granted by the Legislature in view of the greater advantages to the public which are expected to result from the improvement," this authority "must be confined to the limits and conditions of the grant" (*M. & O. R. R. v. Hicks*, 5 Sneed, 427), and it will not be extended to cover a structure that in any respect is a public nuisance." Under such granted power, if a bridge is erected over a

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navigable stream, "it must be sufficiently elevated as to admit of the safe and convenient passage of such boats or vessels as are most advantageously used for the conveyance of travelers or freight upon the river or water course spanned by the bridge, or if not thus constructed, there must be a draw of such size and structure as not materially to infringe the right of free and unobstructed navigation." *Jolly v. Terra Haute Draw Bridge Co.*, 6 McLean, 237.

Under the facts of the case, and in view of the rule as announced by these authorities, we have no hesitancy in saying that the railway company cannot protect itself against the present claim of the plaintiff below by an appeal to its charter.

It is insisted, however, by the company that the continued maintenance of this bridge "for twenty years and fifty years," though it be an impediment to navigation, gives it a prescriptive right which is a conclusive defense to this action. Even should it be conceded that a right to obstruct a navigable stream could be created by prescription, yet it is not relied upon by plea, so as now to be of avail to the plaintiff in error. As was said in the preliminary statement of the case, there were filed four pleas setting up in various forms the right of prescription, but on demurrer they were stricken out by the trial Judge. No assignment of error is made on this action. The case therefore stands, in this Court,

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as if prescription had never been relied on. For the rule is well settled that a prescriptive right cannot be shown under the plea of the general issue, but must be set up by special plea. *Shields v. Schiff*, 134 U. S., 351; *McKyring v. Bull*, 16 N. Y., 307; *Matthews v. Ferres*, 45 Cal., 51.

But it is plainly inferable from the record that the learned counsel for the railway company abandoned their special pleas because satisfied that they tendered issues not maintainable in law. For the rule seems to be universally accepted that a right to obstruct a public highway cannot rest on prescription. Such an obstruction is a common nuisance. *Elkins v. State*, 2 Hum., 542; Elliott on Roads and Streets, p. 668; Gould on Waters, Sec. 532; *Arundel v. McCulloch*, 10 Mass., 70; *Miles v. Hall*, 9 Wend., 315; *Morton v. Moore*, 15 Gray, 573.

It is also contended by the railway company that the trial Judge improperly gave in charge to the jury §§ 1808 and 6869 of the (Shannon's) Code. There was no error in this. They were pertinent to the controversy. Even if they had not been they worked no harm to the company. For when it is once determined that the Hiwassee is a navigable river, it did not require the aid of § 1808 to make it a public highway; the common law, in the absence of § 6869, forbade its obstruction to the detriment of navigation.

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Again, it is insisted that the trial Judge erroneously instructed the jury that the question of the navigability of the Hiwassee river was one of fact to be determined by them. There was no error in this. *Daniel Ball v. United States*, 10 Wall., 557; *Morgan v. King*, 35 N. Y., 454.

Other questions arising in the case are disposed of orally.

The judgment of the lower Court is affirmed.

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COAL CREEK, ETC., CO. v. EAST TENNESSEE, ETC., CO.*

(Knoxville. November 10, 1900.)

1. CORPORATIONS. *Proof of existence of.*

The certified list of domestic corporations, published with the session Acts of the Legislature, as required by the general Incorporation Act of 1875, affords *prima facie* evidence of the existence and legal incorporation of the corporations named therein, subject to rebuttal by proof of fatal defects in the proceedings of incorporation. (Post, pp. 564, 565.)

Acts construed: Acts 1875, Ch. 142, Sec. 20; Acts 1885, Ch. 53.

Code construed: § 2033 (S.); § 1697 (M. & V.).

Cases cited: *Brewer v. State*, 7 Lea, 682; *Tillery v. State*, 10 Lea, 35; *Anderson v. Railroad*, 91 Tenn., 47; *State v. Missio*, ante, p. 218.

2. SAME. *Judicial notice taken of certified list.*

The Courts take judicial notice of the certified list of domestic corporations published with the session Acts of the Legislature, pursuant to the general Incorporation Act of 1875, and no proof of such list is required. (Post, p. 565.)

Act construed: Acts 1875, Ch. 142.

Code construed: § 2033 (S.); § 1697 (M. & V.).

3. WILLS. *Power of executors.*

An executor's deed, made in confirmation of his testator's deed lost before registration, is effective to supply the link in the purchaser's title, when the will confers upon the executor full power to sell any and all of testator's real estate, declaring a purpose to clothe the executor with the same power with reference to the testator's property that he himself would have, if living. (Post, pp. 565, 566.)

4. LAND LAW. *Adverse possession within conflicting grants and tolling title.*

Where three grants of different dates have a common interlap, and outside of this interlap, and upon an interlap of the elder and younger grants, adverse possession is held under the

* Pickle & Turner submitted brief on behalf of complainants, being counsel in another case involving same question.—REPORTER.

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younger grant claiming to its boundaries, for seven years, the title under the elder grant is extinguished, but not tolled in favor of the younger grant, and the intermediate grant carries title thereafter to the land within the common interlap of the three grants. (*Post*, pp. 567-580.)

Code construed: § 4456 (S.); § 3459 (M. & V.); § 2763 (T. & S.).

Cases cited: *Trim v. McPherson*, 7 Cold., 18; *Hopkins v. Calloway*, 7 Cold., 37; *Wallace v. Hannum*, 1 Hum., 450; *McLain v. Ferrell*, 1 Swan, 54; *Railroad v. Mabry*, 85 Tenn., 47; *Belote v. White*, 2 Head, 712; *Nelson v. Trigg*, 4 Lea, 705; *Barnes v. Railroad*, 2 Leg. Rep., 272 (S. C., 2 Shan. Cases, 15); *Garrett v. Vaughn*, 1 Bax., 116.

FROM CAMPBELL.

Appeal from Chancery Court of Campbell County.
HUGH G. KYLE, Ch.

LUCKY, SANFORD & FOWLER for Coal Creek Consolidated Coal Co.

J. HENDERSON REID and JOUROLMON, WELCKER & HUDSON for East Tennessee Iron & Coal Co.

WILKES, J. This is an ejectment suit. There was a decree in the Court below and an appeal to this Court. Upon hearing in the Court of Chancery Appeals the decree of the Court below was modified, and there was an appeal to this Court by the complainant, and the defendants, Rothchilds *et al.*, have filed the record upon writ of error.

The first feature presented is that the complainant sues as a domestic corporation, but fails to show that it was ever chartered or organized as such.

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The fact of complainant's organization appears from the published volumes of statutes of the State. Acts of 1835, page 53. The statute of 1875, Chap. 142, Sec. 20 (Shannon, § 2033), provides for the publication of a certified list of all corporations organized under that Act since the last publication, and that such publication shall be legal evidence of the existence of such corporation. Construing this Act it has been held that such publication is *prima facie* evidence of the existence or legal incorporation of such corporation, but the defendant may show that the charter was not registered as required by law. *Brewer v. The State*, 7 Lea, 682; *Tillery v. The State*, 10 Lea, 35; *Anderson v. The Railroad Co.*, 91 Tenn., 47; *State v. Missio*, ante, p. 218.

The Act places this list of domestic corporations on the same status as the published Acts of the Legislature, of which the Courts will take judicial notice, and no proof need be made of the same. Shannon, §§ 5584, 5585, and 5586.

The defendants, Rothchilds and others, assign as error that there was a break in complainant's title, and the Court of Chancery Appeals held that this was cured by a deed from the executors of W. S. McEwen to the complainant as to the undivided half interest of W. S. McEwen. It is found by the Court of Chancery Appeals that McEwen conveyed this interest (through mesne conveyances) until it reached complainant in 1871,

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but the deed was lost before registration. McEwen afterwards died, and his executors, in 1897, made a deed confirming that which had been lost and to supply the same. That Court reports that the executors of McEwen were by his will given full power and control over all the testator's effects whatever, with full power to sell any or all of his real estate, and that there was in the will this clause: "In a word, my intention is just to clothe them with the same power to do any and everything with all the property belonging to my estate that I could do were I alive and managing it myself." The Court of Chancery Appeals was of opinion the will gave the executors the power to confirm this deed which had been made and lost, and in this we think there was no error.

We come next to the question of title upon its merits. The land in controversy is covered by three separate grants from the State. The defendant, East Tennessee Iron & Coal Co., deraign their title to the State under a grant to Eastland and Lane No. 21929, of date January 30, 1838, and this is the oldest grant and the best paper title, and will be referred to as title or grant No. 1. The complainant, Coal Creek Consolidated Coal Co., claim under grant No. 26078 to Wm. Scott, of date January 29, 1848, and this title will be referred to as No. 2. The defendants, Rothchilds and others, claim under a

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grant to Hatmaker and another for 500 acres, No. 30450, date October 22, 1860, and this title will be referred to as No. 3. Holders of title No. 3 claim under seven years adverse possession and the statute of limitations, under their assurance of title. The claimants under Nos. 1 and 2 have never had actual possession of any part of the controverted territory. The Chancellor held that grant No. 1 was the oldest and best title, and that the claimant under it was entitled to recover all the land embraced in it except that portion covered by the other two grants, but as to that portion the title under grant No. 1 had been extinguished and barred by the adverse possession under the third grant, and title No. 1 having been extinguished by the adverse possession under title No. 3, title No. 2, being next in point of seniority, was the superior title to the premises in dispute. The adverse possession under the third title was within the boundaries of the first title, but not within those of the second title, and the complainants holding the second title were declared entitled to recover the land embraced within the conflicts of these grants.

The defendants, Rothchilds and others, who own the third title, appealed to this Court. Title No. 1 covers the whole of the land in controversy. Title No. 2 covers only a part of title No. 1, and only part of title No. 3. Just outside the lines of the second title, but inside the lines of

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the first title, was the possession of the third title, and there is no question but that the possession continued for more than seven years before this suit brought, under a deed purporting to convey title in fee. The Court of Chancery Appeals report that if the contest was alone between the third and the first title, the former would prevail to the extent of its boundaries; that if the contest was between the second and the first titles, that the latter would prevail, as it is the older, and there has been no possession under either. Also that if the contest was between the second title and the third title, that the former would prevail, as there had been no adverse possession under the latter upon the second title unless the third title having defeated the first title can draw that title to itself and thus defeat the second title. But in this suit complainants claim under the second title, and sue parties holding under both the other titles, one being older without possession, and the other younger but with possession, on the first title but not on the second title. The Court of Chancery Appeals held that the adverse possession under the third title tolled the first title, and vested it in the claimants of the third title. The reasoning of that Court is that there is but one true title, that it vested in the first instance under the older or first title, but when the possession under the third title had continued seven years, the older title was

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vested in the claimants of the third title. Hence the complainant had failed to make out its title, and its bill was dismissed. It is insisted on this feature of the case, on one hand, that the Court of Chancery Appeals erred in holding that the first title was "tolled to" and vested in the claimants of the third title, the parties in adverse possession as to the first title but not as to the second title. On the other hand, it is insisted that the conclusion reached by the Court of Chancery Appeals must result from the operation of the statute (Shannon, § 4456), which in substance provides that any person having had seven years adverse possession of any granted lands, holding under an assurance of title purporting to convey an estate in fee, is vested with a good and indefeasible title in fee to the land described in the assurance of title. We are of opinion this contention is not well made, notwithstanding the great array of authority that apparently supports it. We think the correct rule is, that the adverse holding under the color of title has merely the effect to extinguish an older title as to which it is adverse, but does not draw the older title to itself. If not so, the logic of such holding would require that the adverse holder should, in a contest with a third person, set up the older title as a chain in his own, or the beginning and formation of his own. But in order to maintain his title, the party in possession must

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hold adversely to the party whose title is to be extinguished, and until he has actual adverse possession as to such party the statute of limitations does not run against such party. When the statute says that the adverse holder acquires a good and indefeasible title, it means that such title is indefeasible by any one as to whom the holding has been adverse. The adverse holding does not vest the title of the first holder in the adverse claimant, but extinguishes it, and the adverse title does not rest upon the title it has defeated, but upon its own assurance and holding thereunder. It will not do to say that this language means that the adverse possession tolls and brings to its support the superior title and vests an indefeasible estate in the possessor, and the whole matter in controversy is whether, in case of adverse possession under a junior title, the superior title is kept alive and brought to the support of the adverse title, or whether it must be treated as extinguished or abandoned. The theory of the law is not that the superior title is kept alive and brought to the support of the party in possession, but it is that it is extinguished as if it had been abandoned, or had never existed. We think the Act lends no color to the idea that the title defeated is tolled and brought to the relief of the title which defeats it, as against an intervening title; but, on the contrary, it is extinguished, and the adverse claimant holds the

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property under his own title, and must rest on that alone. It is conceded that a barred or extinguished title cannot be set up to defeat an action of ejectment, and it is sought to escape this rule by the proposition that while the title is extinguished in the original owner, it vests in the adverse holder. It is said that there can be but one true title, but this, we think, proves nothing except that the property will remain wherever in the conflict of title it should belong, and where the better title appears to rest. We are aware that there are a large number of cases using expressions which seem to hold that the older title is tolled and brought to the relief of the adverse holder. The doctrine as laid down in 1 A. & E. Enc. Law (2 Ed.), 883, is in these words: "By the adverse possession of land for the statutory period of limitation, the adverse holder acquires the title in fee simple, which is as perfect as a title by deed. Its legal effect is not only to bar the remedy of the owner of the paper title, but to divest his estate and vest it in the party holding adversely for the required period of time, so that he may maintain an action of ejectment for the recovery of the land even against the holder of said paper title who has ousted him. In support of this text a large number of cases are cited from the Supreme Court of the United States and from the Supreme Courts of Alabama, Arkansas, California, Connecticut,

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Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, and Wisconsin. Tennessee is also embraced in this list of States thus holding.

We have not access to all the reports and cases cited, but it is fair to assume that the substance and holding of the cases is properly stated. It will be noticed that this text does not say that the effect of the adverse holding is to divest the paper title and vest it in the party holding adversely, but to divest the estate. In other words, the adverse holder becomes entitled to the property, but he acquires it not by drawing the paper title to himself, but by extinguishing such paper title and establishing another title on his assurance or color, coupled with his adverse possession.

In *Waterhouse v. Martin*, Peck, 392 and 456, it is said that not only the right of possession is barred under our statute of limitations, but the right of property also, and the adverse possessor acquires what his adversary loses. But this means that he acquires the property which his adversary loses, not that he acquires it by his adversary's title, but by his own title.

In *Trim v. McPherson*, 7 Cold., 18, the Court uses the language, "the title to the property will be regarded as vested in the possessor," but this

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does not mean the title which the original owner had, but that the adverse holding vests the holder with the title to the property under his own assurance coupled with the possession.

In *Hopkins v. Calloway*, 7 Cold., 37, it is held that under the first section of the Act of 1819 an adverse possession of seven years under an assurance of title purporting to convey the fee, not only bars the remedy of the party out of possession, but vests the possessor with the absolute estate in fee simple. But this language must be taken to be a general expression, and not an absolute holding under all contingencies. It is evident the adverse possession does not vest a fee simple estate as against married women, infants, and persons under disability except under the saving provisions of the statute nor against any person as to whom the holding was not adverse. Such persons had no right of action, they could not sue in their own names; as to them the statute did not run.

We think this is the extent of the holding and the real decision in the cases of *Wallace v. Hunnum*, 1 Hum., 450; *McLain v. Ferrell*, 1 Swan, 54; *Railroad Co. v. Mabry*, 1 Pick., 47; *Belote v. White*, 2 Head, 712; *Nelson v. Trigg*, 4 Lea, 705, 706; *Barnes v. Railroad*, 2 Leg. Rep., 272 (S. C., 2 Shannon's cases, 15); and also the large number of cases holding a similar doctrine as to personal property. See *Garrett v.*

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Vaughn, 1 Bax., 116, where many of them are cited and collated, and the same may be said of the text and cases cited in 1 Enc. of Law (2 Ed.), 874, and 13 Enc. of Law (original Ed.), 693-697.

It is true that the title acquired by the adverse holder may be as effectual for remedies and defenses as title acquired in any other manner, as is held in *Greer v. Course*, 24 Am. St. Rep., 438; *Norment v. Eureka Co.*, 39 Am. St. Rep., 45, and note page 54; *Myers v. McGavock*, 42 Am. St. Rep., 630, note page 649; *Cannon v. Stocman*, 95 Am. Dec., 205, note page 209; 3 Washburn on Real Property, 163-165.

The latter authority says: "The statute takes away the title of the real owner and transfers it, not in form indeed, but in legal effect, to the adverse occupant. In other words, the statute of limitations gives a perfect title." But it is evident the learned author was but emphasizing the fact that the statute did not merely take away the remedy, but also vested the estate under the new title. This we think means that whereas before the original owner had a fee simple title, now the adverse holder has it. Not the title of the original owner, for that was extinguished, but the title built upon the paper assurance of the adverse possessor coupled with his adverse possession. It must be admitted the language is broad enough to admit the contrary construction, but it

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also admits of the construction we give it, which is in our opinion the most reasonable and rational. But the author was merely considering the status of the adverse possessor against the party to whom the possession was adverse, and not as to an intermediate title as to which there had been no adverse possession. That the adverse possessor holds under his own assurance of title, and not that of the original owner, is manifest from the language of the statute, which says that he is vested with a good and indefeasible title in fee to the land described in his assurance of title. We think the view we have taken of this question is borne out, strengthened, and sustained by the second clause of the Act of 1819, Chapter 28 (Shannon, § 4457), which uses this language: "And, on the other hand, any person, and those claiming under him, neglecting for the term of seven years to avail themselves of the benefits of any title, legal or equitable, by action at law or in equity effectually prosecuted against the party in possession under (recorded) assurance of title, as in the foregoing section, are forever barred." This clearly contemplates a party in possession holding adversely to the claimant, who has a right to sue. But that right to sue does not accrue except when there is a party in adverse possession to the claimant who is to be barred, and until that accrues the statute does not begin to run.

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nor the bar begin to be formed as to such claimant.

We have not seen proper to refer to the Kentucky cases in this discussion, because we think the statute of Kentucky is materially different from our own, inasmuch as it declares in express terms that the adverse possession shall bar and toll the right of entry into such land by any person under an adverse claim or title, and such possession as will bar the right to recover the same shall vest the title in the occupant or his vendee. General Statutes of Kentucky, 1879, Sec. 1, p. 627. This language may be construed that the title of the original owner shall be tolled and vested in the adverse holder, but it is quite different from the language of our statute.

This Court has had occasion to know the system of issuing grants by the State, under which multiple grants have been issued to the same lands. It has been a fruitful source of litigation in the Courts, and this Court judicially knows that from the beginning of its history the State has issued two or more grants to the same land, thus giving under the sanction of the State claims of title to the same lands to various parties, and the Court is continually called upon to pass upon these conflicting titles and determine which is the better, until quite a system of land laws more or less arbitrary have been built up in order to quiet titles. We think that as one of these rules

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it has grown to be a fundamental principle that the oldest title shall prevail, other things being equal, and when the oldest title is extinguished or abandoned, the one next in seniority should be best unless the fact of adverse possession exist as to the secondary as well as the primary title, so that when the title under the first was extinguished as to land by the adverse possession under the third title, the title under the second grant became the oldest and best title, and must prevail unless the possession under the younger or third grant was adverse as to it also, which it was not, the possession under the third grant not being upon the lands embraced in the boundaries of the second grant. We append a map of the

premises to show as well as we can the relative relations of the three grants and the portions cov-

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ered by actual possession. A B C D represents the property in controversy.

It is said there can be but one true title, and this is true if the term true title is used as synonymous with superior title. But there may be many grants purporting to convey a fee simple title to the same land, and such is the case whenever there is a conflict of grants. Each purports to be a fee simple title, and for practical purposes may be so regarded so long as it is not brought into contest with a superior title purporting to convey a fee. The contest decides which is the superior title while each purports to be in fee. The terms "true titles" and "titles in fee simple" have been used in our books to distinguish between the character of titles acquired under the Act of 1819 and those acquired by adverse possession before that Act, the title in the one case being vested in the adverse holder while in the other he simply has a right of possession only. But no title can with propriety be said to ever become the true title until its superiority to all other titles is either conceded or established after contest.

While we have not had the time to read closely all the cases cited, we are aware of none of them presenting the exact question here involved—that is, the right of an intervening or intermediate title as against a title acquired by a

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holding adverse to the superior title but not as to the intervening title.

We are of opinion that a claimant under title with adverse possession as against the holder of one title cannot *ipso facto* acquire a superior title as against other claimants having title in themselves, and as to whom he has never been in adverse possession. To make his title superior to all other titles, the party must have a possession that is adverse to all other titles, and he only obtains a true title when he holds adversely for the required time against all titles superior to his own.

We will suppose the attitude of these parties to be reversed, and that the suit is brought by the claimants of the third title to establish it as against claimant under both the first and second grants. They would have to support their action first by a grant from the State for the land, next an assurance of title under the conveyance to them, and, third, a possession on the premises. Now, as to the claimants under the first grant, they could succeed because they have an assurance of title and adverse possession within the interlap, but as to the second grant claimants they should not succeed, because, while their assurance of title covers lands within the second grant, there is no possession on the interlap between the boundaries of the second and third titles. The theory upon which they would recover against the first

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title is that having possession adverse to it the claimants under the first grant must be held to have abandoned their title to the extent claimed by the third title, but there is no such presumption as to the second title, because there has been no possession upon it adverse to it and calling for a suit, and no presumption of abandonment can arise. While, therefore, in this aspect of the case, the third could bar out the first title by the adverse possession, they cannot bar the second title, for they have had no adverse possession as to it.

We are of opinion, therefore, that the Court of Chancery Appeals is in error; that the holders under the third grant have never drawn to themselves the first title, and do not hold under it, but that is extinguished as to the land embraced in the boundaries of the third grant, but that so much of the land embraced in the third grant boundaries as lies within the second grant must be held to pass under that grant, the second, to complainant, the first title having been extinguished and virtually abandoned. This of course only extends to the interlap between the second and third grants and no further.

The costs of this Court will be paid by the Rothchilds, or parties claiming under the third grant; the costs of the Court below as adjudged by the Chancellor.

Rhea County v. Sneed.

RHEA COUNTY v. SNEED.

(*Knoxville*. November 10, 1900.)

1. COUNTY. *Not liable for labor done on public bridge.*

The law implies no contract on the part of a county to pay the laborers employed in the construction of a public bridge, where it, through commissioners, let the contract for the building of the bridge to a bridge company, at a stipulated price, and that company and its subcontractors employed such laborers. (*Post*, pp. 582-585.)

Case cited : *Madison County v. Gibbs & Dean*, 9 Lea, 383.

2. SAME. *Not liable for the neglect of its Bridge Commissioners.*

The general rule that a county is not liable for damages resulting to third persons from the neglect of its officers in regard to the public highways, applies and operates to exempt the county from liability to anyone for the neglect of its Bridge Commissioners, in letting a contract for the construction of a public bridge, to take the bond required by the Act of 1899 from the contractor, conditioned to "pay for all materials and labor used in said contract." (*Post*, pp. 585-587.)

Act construed : Acts 1899, Ch. 182.

Cases cited: *Wood v. Tipton County*, 7 Bax., 112; *White's Creek, etc., Co. v. Davidson County*, 14 Lea, 73; *Williams v. Taxing District*, 16 Lea, 535.

3. BRIDGE COMMISSIONERS. *Liability for failure to take bond for benefit of laborers and materialmen.*

A public bridge is a "public work" within the meaning of the Act of 1899 forbidding the letting of "any public work" for city, county, or State. "until the contractor shall first execute a good and solvent bond, to the effect that he will pay for all materials and labor used in said contract," and County Bridge Commissioners letting such bridge without exacting such bond, are not only indictable under said Act, but liable, in a civil action, for any damages resulting to laborers and materialmen who would have been protected by the prescribed bond, if executed. (*Post*, pp. 585, 586.)

Act construed : Acts 1899, Ch. 182.

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Cases cited: *Queen v. Dayton, etc., Co.*, 95 Tenn., 458; *Reden v. Grimm Bros.*, 97 Tenn., 220.

FROM RHEA.

Appeal in error from Circuit Court of Rhea County. M. D. SMALLMAN, J.

J. O. BENSON and A. P. HAGGARD for Rhea County.

B. G. MCKENZIE for Sneed.

CALDWELL, J. Under the appointment and authority of the County Court of Rhea County, three commissioners contracted with the Groton Bridge Company to erect a bridge across Richland Creek, in that county, at the price of \$1,875, to be paid as follows: \$1,000 when the substructure should be ready for the superstructure, and the remaining \$875 when the entire structure should be completed.

For some unexplained reason, the commissioners failed to exact the contractor's bond contemplated by Chapter 182 of the Acts of 1899, and it was not executed.

The Groton Bridge Company sublet the construction of the substructure to Thompson, and he in turn sublet it to Nipper, who employed numerous laborers to do the work for him. While

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inspecting the work as it progressed, the commissioners, on different occasions, saw these laborers engaged upon the masonry in the abutments, but assumed no control of them and made no contract with them. Robert Sneed was one of these laborers. When his services were ended and his employer, Nipper, had paid him only a part of the compensation due him, he demanded the residue from the commissioners, who refused to pay it upon the ground that they had not employed him, and therefore owed him nothing. This demand was made and payment refused after the substructure was completed, before final settlement with the original contractor, and when the county still owed it the latter installment of \$875. After the bridge had been finished, accepted and paid for, Sneed, to whom the balance was still due from Nipper, brought this suit to recover the amount thereof from the county.

The Circuit Judge tried the case without a jury, and adjudged the county liable "both at common law and because of the failure of the commissioners to take bond as required by Chapter 182, Acts of 1899," for the sum claimed; and the county appealed in error.

The learned trial Judge was in error.

Clearly common law responsibility on the part of the county for the debt could properly be based alone upon an express or an implied contract, and neither of these is shown in the proof. It is

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not contended that Sneed had an express contract with the county, nor is the fact that the commissioners frequently saw him with other laborers at work on the masonry, and afterwards accepted the completed structure, sufficient to raise an implied promise on the part of the county in his favor. They engaged the Groton Bridge Company to furnish a finished structure for an agreed price, and had the legal right to assume that it would pay for all labor and material employed; and by paying that price to that company they absolved the county from all liability for the benefits received.

If the Groton Bridge Company had abandoned its contract, and Sneed, with the knowledge of the commissioners, had then constructed the bridge and it had been accepted, the case would be like that of *Madison County v. Gibbs & Dean*, 9 Lea, 383, and he, under the authority of that case and upon principle, would be entitled to a recovery against the county for the benefits conferred, on the ground of an implied promise to pay therefor, but, as has been seen, such is not the case presented in this record. Here the performance of the express contract by and with the Groton Bridge Company for the completed structure necessarily precludes the idea of an implied contract with Sneed or any other laborer doing a part of the work. An express contract with one person to perform the whole of a certain piece of work

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is utterly inconsistent with an implied contract with another person to do a part of the same work, and, being so, the two cannot have legal efficacy at the same time.

The law never implies a promise from a situation clearly covered by an express contract, as in this instance.

The object of Chapter 182 of the Acts of 1899, as recited in the title, is "to protect laborers and furnishers of materials on public works." The first section prohibits the letting of "any public work" for city, county, or state "until the contractor shall first execute a good and solvent bond to the effect that he will pay for all materials and labor used in said contract." The second and fourth sections authorize every unpaid laborer and materialman, who has given the prescribed notice of his demand, to bring an action upon that bond in his own name; and the third section makes it a misdemeanor for any officer to let a contract for any public work without requiring the bond provided for in the first section.

Undoubtedly the structure erected by the Groton Bridge Company was a "public work" within the contemplation of this Act, and the county's commissioners were as certainly guilty of a misdemeanor in letting the contract without first taking the required bond.

Under a well established rule of law, that

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marked dereliction of positive duty on the part of the commissioners constitutes negligence *per se*, and renders them liable not only to a criminal prosecution for the statutory misdemeanor, but also to a civil action for damages resulting to laborers and materialmen who would have been protected by the prescribed bond if executed. *Queen v. Dayton Coal & Iron Co.*, 95 Tenn., 458 and citations; *Riden v. Grimm Bros.*, 97 Tenn., 220 and citations.

It does not follow, however, that the county is liable for the neglect of its commissioners. The duty of requiring the prescribed bond is by the statute devolved upon the "public officer" charged with letting the contract, and for the failure to perform that duty, the statute declares "such officer shall be guilty of a misdemeanor" (secs. 1 and 2). The duty and liability for its breach are imposed on the same person; consequently, these commissioners, who should have taken the bond, and not the county, are responsible for the omission disclosed in this case. The mere fact that the commissioners were appointees of the county and acting for it, does not render it responsible for their failure to take the bond. Their departure from the course of duty in this regard was in no legal sense the act of the county, nor one for which any statute fixes liability upon the county.

It is a general rule that a private action cannot be maintained against a county for damages

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arising from the neglect of its officers in connection with public highways, unless some statute confers the right to do so. Cooley's Const. Lim., 247; *Wood v. Tipton County*, 7 Bax., 112; *White's Creek Turnpike Co. v. Davidson County*, 14 Lea, 73; *Williams v. Taxing District*, 16 Lea, 535.

It results that this action is not authorized by the common law or by the statute, and that the judgment must be reversed, and the case having been tried below without a jury, this Court rendering the judgment the trial Judge should have rendered, dismisses the suit at the cost of Sneed.

State, *ex rel.*, v. Agee.

STATE, *ex rel.*, v. AGEЕ.

(*Knoxville*. November 17, 1900.)

QUO WARRANTO. *Power of District Attorney over.*

The District Attorney by whose consent and authority a proceeding in the nature of *quo warranto* has been instituted to impeach the title to a public office, has the right and power to dismiss and discontinue the same, whenever he deems that the public interests demand that course.

Code construed: §§ 5168-5170 (S.); §§ 4149-4151 (M. & V.); §§ 3412-3414 (T. & S.).

Cases cited: *State v. Turnpike Co.*, 3 Tenn. Chy., 363; *State v. McConnell*, 3 Lea, 337; *State v. Johnson*, 8 Lea, 74.

FROM CAMPBELL.

Appeal from Chancery Court of Campbell County.
HUGH G. KYLE, Ch.

JOUROIMON, WELCKER & HUDSON for Relator.

J. E. JOHNSTON and LUCKY, SANFORD & FOWLER for Agee.

BEARD, J. The bill in this cause was filed by the District Attorney-general in the name of the State of Tennessee upon the relation of E. T. Warner, claiming to be Mayor, and G. A. La-

State, *ex rel.*, v. Agee.

Follette and R. B. Winkler, claiming to be Aldermen, of the city of LaFollette, against respondents who, as the result of an election recently held in that city, were claiming title to various municipal offices in that city. The proceeding is on information in the nature of a *quo warranto*, instituted by the State for the purpose of impeaching this title. Pending the suit in the Chancery Court, the District Attorney General petitioned the Chancellor for leave to dismiss the suit, alleging that, upon investigation, he had become satisfied that it was not to the best interest of the State to further prosecute it. For some reason this petition was not granted. Subsequently the petition was called to the attention of the Court by a motion to dismiss made by the solicitor of the respondents, which was overruled. This action of the Court is made the basis of an assignment of error by the respondents.

The bill in the case was filed under §§ 5168, 5169 and 5170 of the (Shannon's) Code, and the signature of the Attorney-general to it was essential. *State v. Turnpike Company*, 3 Tenn. Chancery, 163; *State v. McConnell*, 3 Lea, 337; *State v. Johnson*, 8 Lea, 74.

And it is "beyond all doubt the suit provided for under these sections was intended to be a suit by the State to subserve the public interests." *Id.*

From these premises it follows that the District

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attorney-general's consent is necessary to a continuation of such suit; that it must remain under his control during its prosecution, so that should he find, after its institution, that the best interests of the State require its discontinuance, it is his right to move, and the duty of the Court to order, its dismissal.

Such is the view with regard to the control of the State's representative over *quo warranto* proceedings instituted under statutes like ours, taken in *Mathews v. State*, 82 Texas, 577; *People v. Knight*, 13 Michigan, 231; *Com. v. Dillon*, 81 Pa. St., 44.

The Chancellor was in error in retaining the suit after this petition was filed. On this ground the decree of the Court of Chancery Appeals dismissing the bill is affirmed.

G. McHenderson v. Anderson County.

G. McHENDERSON v. ANDERSON COUNTY.

(Knoxville. November 17, 1900.)

1. COUNTY COURT. *Chairman of, has no authority to employ counsel to bring or prosecute suits for county.*

The Chairman of a County Court has no authority, express or implied, to employ counsel, on behalf of the county, to bring an action against a defaulting collector—e. g., a County Trustee, and his sureties—to recover of them county funds. His duty, in such case, is to take the advice of the District or County Attorney, and, if necessary, place the matter in his or their hands for suit. The authority to employ counsel, to be paid by the county, to bring or prosecute actions on behalf of the county, or to assist therein, rests in the County Court in quarterly session. The Chairman's authority is limited to employment of counsel to defend suits against the county. (*Post*, pp. 597-600.)

Code construed: § 660 (S.); § 577 (M. & V.); § 520 (T. & S.).

2. SAME. *Contract by, to employ counsel, not implied.*

No contract for the employment of counsel by a county to bring and prosecute an action for county funds against its defaulting Trustee and sureties, will be implied from the fact that the members of the County Court knew of the pendency of the action, and that the counsel claiming compensation were rendering valuable services therein, and that these services resulted in a substantial recovery, which was accepted by the county, especially when the counsel claiming such contract and compensation were the District Attorney, entitled by law to fixed fees or salary, and a County Attorney, entitled by contract to a fixed salary, and their business associates, who were performing mere official duty. (*Post*, pp. 597, 598, 608, 609.)

3. DISTRICT ATTORNEY. *Duty to prosecute actions against defaulting collectors of taxes.*

It is the duty of District Attorneys, without additional compensation out of the public treasury, even since the inauguration of the system of back tax attorneys and revenue agents, to

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bring and prosecute all actions, whether in Circuit or Chancery Courts, or whether by motion or otherwise, against all delinquent collectors of taxes and their sureties, including County Trustees since 1875, when they were also made collectors of taxes. (*Post*, pp. 600-607.)

Code construed: §§ 67, 524, 526, 962, 963, 5768, 5771 (S.); §§ 54, 490, 492, 583, 797, 798, 4732, 4735 (M. & V.); §§ 6, 428, 430, 669, 670, 3961, 3964 (T. & S.).

4. SAME. *Fees of.*

Public officers, including District Attorneys, are forbidden to receive compensation for the performance of official duty, other than that fixed by law. Hence, a District Attorney cannot contract with a county for additional compensation for himself and those he may associate with himself, in the prosecution of an action that it is his duty to prosecute officially. It matters nothing that the services performed were arduous and valuable beyond the compensation allowed, and were performed with ability and fidelity. The law demands ability and fidelity of its officials in the performance of public duty. Public office must be accepted with its burdens, as well as its benefits. (*Post*, pp. 608, 609.)

Code construed: § 962 (S.); § 797 (M. & V.); § 669 (T. & S.).

Cases cited: *Mooney v. State*, 2 Yer., 578; *State v. Bachman*, 6 Lea, 649; *Keys v. State*, 7 Lea, 408; *Baxter v. Comptroller*, 14 Lea, 122; *Johnson v. State*, 94 Tenn., 499; *Hope v. Hamilton County*, 101 Tenn., 325; *Holzclaw v. Hamilton County*, 101 Tenn., 338; *State v. Murphy*, 101 Tenn., 515; *State v. Spurgeon*, 99 Tenn., 659.

FROM ANDERSON.

Appeal from Chancery Court of Anderson County.
R. H. SANSOM, Special Ch.

J. A. FOWLER and C. J. SAWYER for McHenderson.

LUCKY, SANFORD & TYSON for County.

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WILKES, J. This is a bill to recover attorneys' fees from Anderson County for services rendered in bringing a defaulting Trustee to settlement. It is filed by G. McHenderson, John B. Holloway and X. Z. Hicks, against the county of Anderson and Underwood, its Trustee, and seeks to recover the sum of \$3,000. The claim is based upon a suit heretofore brought in the Chancery Court of Anderson County against W. W. Hayes, a defaulting Trustee for the county, and his sureties upon his several bonds, he having held several terms of office as such Trustee. The result of this chancery suit was a recovery against the Trustee and his sureties for the sum of \$20,036.07, and upon this recovery a lien was declared in this Court for the reasonable fees of complainants. It appears that after the judgment was taken, some concessions upon the amount were made by the county authorities for reasons satisfactory to them, but the greater part of the recovery—to-wit, \$16,000—was paid to the County Trustee, and was by this bill enjoined in his hands until complainants' demand should be satisfied.

The injunction was dissolved upon the agreement of the county to issue interest-bearing warrants for the amounts decreed to be due the complainants when judicially ascertained, if the county should be held liable. The county defends upon the grounds hereafter stated:

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1. That Mr. Holloway was not employed by the county, and rendered no service in the suit, except such as he may have voluntarily rendered in aid of his partner, McHenderson.

2. That as to McHenderson, he was never employed as an individual to prosecute the suit by the county, but, being district attorney-general for the district in which Anderson County is situated, he performed such services as he did render as District Attorney-general, and in his official capacity.

3. That as to complainant X. Z. Hicks, he was not specially employed in the suit by the county, but that he was County Attorney for the county, upon a salary of \$150 per annum, and such services as he rendered were in his official capacity, and not as an individual attorney, and that they were compensated for in his regular annual salary.

4. That as to the lien fixed and declared by this Court upon final hearing of the Hayes suit to cover the reasonable fees of attorneys, it was rendered at the instance of complainants on an *ex parte* motion, which was not specially directed by the Court or brought to its notice, and that the county had no notice of the same and is not bound thereby.

The county filed an answer setting up these defenses and by agreement the answer was treated

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as a cross bill for the purpose of setting aside such lien if the Court should so direct.

The Chancellor rendered a judgment in which it was decreed that McHenderson was entitled to recover \$2,178.49 in the interest of all the complainants, and that they should settle their respective rights and equities between themselves, and the bill as to complainant Hicks was dismissed without cost. The county appealed. The decree of the Court below proceeded upon the basis that the chairman of the County Court employed McHenderson to prosecute the suit, and that it was understood he was to employ his partner, Holloway, to assist him, as well as the complainants Hicks, and that the county accepted the services of these attorneys in the prosecution and conduct of the suits.

The Court of Chancery Appeals finds as facts that these attorneys did represent Anderson County throughout the entire litigation with Hayes and his sureties, and were the only attorneys who appeared on its behalf.

That Court further reports the amount of labor done and service performed by each of these attorneys, and that the suits involved great labor, many questions of law, many items of liability; that the case was conducted and prosecuted with great industry, zeal, skill and ability, and to a successful termination, and that the services were reasonably worth the amount allowed by the Chan-

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cellor, but that it was a matter of doubt whether the county was liable therefor.

The Court reports that McHenderson, at the time he brought and prosecuted the suit, was District Attorney-general for the Second Judicial Circuit of the state, in which Anderson County is situated; that he said to Mr. Farmer, the Chairman of the County Court, who had been instructed by the County Court to advise with him in regard to the Hayes default, that unless it was desired to indict Hays he had nothing to do with the matter in his official capacity, and that he thought it was the duty of the Chairman to place the matter in the hands of Mr. Young, back tax collector for Anderson County, or in the hands of an attorney appointed by the Comptroller for that purpose; that under recent statutes, he was relieved from collecting taxes from delinquent Trustees; that the compensation of revenue agents was fifteen per cent. on the amount collected, and this would compensate the tax attorney for collecting the tax, and the county would be saved any expenses; that he advised if any suit was brought it be in the Chancery Court, so that a full and fair settlement could be made and the liability properly apportioned among the different bondsmen; that he had nothing to do with such suits as District Attorney-general, and if the chairman did not desire to put the matter in the hands of the

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revenue agent, that it be placed in the hands of Mr. Hicks, the County Attorney.

The Court of Chancery Appeals reports that the Chairman approved, if he did not originally suggest, bringing the suit in the Chancery Court, as a result of the conference between the Chairman and Mr. McHenderson. That Court also reports that Mr. McHenderson was employed to bring the suit with the understanding that he would associate with him Mr. Holloway and Mr. Hicks; that Mr. McHenderson understood that he and Mr. Hicks were employed as individuals, and not in any official capacity, and they would receive reasonable compensation for their services; that Mr. McHenderson was to be leading counsel, and that the allowance was to be made to him in his name on behalf of himself, his partner, and his associate, Mr. Hicks. That Court further reports that the several members of the County Court knew of the pendency of the suit, and that the complainants were representing the county in the litigation, and were allowed to do so without protest, and the county received the benefit of their services.

That Court, however, does not report that the members of the County Court knew that complainants had been employed as individuals, and were representing the county in their individual, and not official, capacities as attorneys.

That Court reports that unless there is some

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law to prevent complainants from rendering the service as individuals, and to require them to act officially, then the complainants are entitled to receive reasonable compensation.

The Court of Chancery Appeals was of opinion that complainants were entitled to recover, and affirmed the decree of the Chancellor. That Court holds that it is not material that complainants were employed by the Chairman and not the Court, since the members of the County Court knew that the attorneys were rendering the service and did not object.

Further, that the provisions of the statutes to which reference will be hereafter made which define the duties and fix the compensation of the District Attorney for services in regard to revenue collectors, apply only to cases where the defaulting collector is proceeded against by motion in the Circuit Court, and have no application to cases where it is necessary, convenient, or advisable to bring the suit in the Chancery Court, and that it was not one of the official duties of the District Attorney-general to bring or prosecute such suit, especially when the suit involved complicated accounts extending from term to term through a series of years.

We think, under the finding of the Court of Chancery Appeals, it must be held that if the complainants were employed at all in their individual capacity, it was by the Chairman of

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the County Court, and not by the Court as a body. While it is found that the members of the County Court knew that complainants were representing the county in the litigation, it is not found that they knew that it was under an employment as individuals by the Chairman, or in any other way than in an official capacity and character. We are of the opinion that the Chairman of the County Court had no authority to employ complainants to represent the county in this litigation as individuals or to agree to pay anything therefor by the county.

Section 660, subsec. 1, Shannons' compilation, provides that the Chairman of the County Court shall have power to employ counsel to defend suits against the county, who shall be entitled to a reasonable fee, to be allowed by the Court trying the case.

This is the extent of the power conferred by statute upon the Chairman of the County Court in regard to employment of counsel, except as hereinafter stated. The authority to employ counsel to prosecute suits for the county generally rests in the County Court in quarterly session, when it exists at all.

The argument is made that the Chairman of the County Court is the accounting officer for the county, and hence must have implied authority to employ counsel to bring defaulters to settlement, but this reasoning we think is not well founded. The theory and

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provision of the law is that while the Chairman is the auditor of the accounts of collectors, he is authorized to call upon the District Attorney for advice, and when there is a dispute, to place the matter in the hands of the District Attorney for adjustment.

But, in addition, we are of the opinion that it was the official duty of the District Attorney to prosecute the suit, and receive for such service the compensation provided by statute. This was the duty of the District Attorney under the code of 1858.

The following provisions are contained in the code of 1858 and in the compilation of statutes by Shannon, Code, § 5768: It shall be the duty of each District Attorney: "12. To prosecute all motions against delinquent collectors of public taxes when made, or ordered to be made, by the Comptroller or County Trustee, without charge therefor."

"Sec. 670. For any neglect or refusal to settle his accounts the Comptroller and Judge or Chairman of the County Court shall proceed against the collector and his sureties by motion, which shall not be abated, quashed, or delayed by any want of form or informality in prosecuting the same."

"56. The word 'collector' includes any person intrusted with the collection of public revenue." (Shannon, § 67.)

"428. If the Trustee, on going out of office, fails to pay over the balance of revenue in his

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hands, he and his sureties shall be liable to judgment, on motion of the District Attorney before the Circuit Court." (Shannon, § 524.)

"430. If he fail to pay money to those entitled to the same, or neglect to call those to account who ought to pay money into the treasury, whereby the county suffers loss, in either case he and his sureties shall be liable for the sums not collected or paid, on motion before the Circuit Court." (Shannon, § 526.)

"669. The District Attorney shall have a fee of ten dollars for prosecuting to judgment any delinquent collector of public money and his sureties, or either, to be taxed in the bill of costs and paid by the defendants, and no other fee or commission shall in any case be allowed the District Attorneys for their services in the collection of the public revenues." (Shannon, § 962.)

"3964. The compensation of the Attorney-general consists exclusively in the fees of office."

At the time of the adoption of the code, and down to the passage of the Act of 1875, Chapter 91, the Trustee himself collected no taxes, and was merely the depository of all the county revenue collected by the tax collectors, clerks, and justices and turned over to him by them, he being charged only with the safe-keeping and accounting therefor.

(a) Under the code of 1858, therefore, taking all the foregoing provisions together, in case any

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person intrusted with the collection of public revenue became delinquent and failed to settle his accounts, if the delinquency was as to State revenue, it was the duty of the District Attorney to proceed against him by motion in the Circuit Court when directed by the Comptroller (§§ 670, 3961), and if the delinquency was as to county revenue, to so proceed when directed by the Trustee (§ 3961) or the County Chairman (§ 670), his fees being fixed at \$10, to be taxed up in the costs (§ 669), and if the County Trustee defaulted as to revenue in his hands, he and his sureties were likewise liable on motion by the District Attorney in the Circuit Court (§§ 428, 430.)

(b) By the Acts of 1875, the office of tax collector was abolished, and it was provided that the Trustee should thereafter, in addition to his other duties, collect all taxes levied on property and polls. Acts of 1875, Chapter 91, secs. 1, 2, and 23, pp. 129 and 135; *Anderson County v. Hayes*, 15 Pickle, 542 at 555.

In other words, the County Trustee himself now also became, under the Act of 1875, a "collector" or "person intrusted with the collection of public revenue," and in the event of his defalcation and failure to settle his accounts as to revenue so collected, it became the duty of the District Attorney to proceed against him by motion in the Circuit Court at the instance of the Comptroller in case of defalcation of State revenue, and at

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the instance of the County Chairman in case of defalcation in the county revenue.

By the Act of 1875 it follows, by necessary implication, that as the Trustee was substituted as to collection of property and poll taxes for the collector, the County Chairman as to all matters of accounting for such taxes, being the officer designated under the code to settle with the Trustee and other collectors of revenue (Code, §§ 517, 660, subsecs. 5, 6), was substituted for the Trustee, and was required to perform all duties in reference to the Trustee that were formerly required of the Trustee toward the tax collector—that is, in case of his defalcation in his collection, to order the District Attorney to enter motion against him and his sureties in the Circuit Court.

The duties of the District Attorney were in nowise changed or lessened. Before the Acts of 1875 it was his duty to prosecute the delinquent tax collector at the instance of either the county trustee or county chairman; after the Acts of 1875, it was his duty to prosecute the delinquent Trustee for delinquency in collection at the instance of the County Chairman. The statute was not intended to change the former law in any other way than by substituting the Trustee for the tax collector as the collecting officer, and the County Chairman for the Trustee as the accounting officer.

(c) It being by law the duty of the District Attorney to prosecute the Hayes suit for the fee

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of \$10 fixed by the Code, which should have been taxed up in the costs, the complainants are not entitled to recover for any services they may have rendered.

“The compensation of the Attorney-general consists exclusively of the fees of office.” (Code, § 3964; Shannon, § 5771.)

“No officer is entitled to demand or receive fees or other compensation for any services further than is expressly provided by law.” (Code, § 5417; Shannon, § 6350.)

Thus the District Attorney is not entitled to a fee where the defendant is arrested on a peace warrant and bound to keep the peace, and is discharged without trial, there being no law authorizing such fee (*Mooney v. State*, 2 Yer., 578), nor to costs as upon a verdict of conviction, where he properly agrees to a verdict of not guilty against the defendant (*State v. Bachman*, 6 Lea, 649); nor to a fee for “final conviction” where after conviction the judgment is reversed and a *nolle prosequi* entered. *Keys v. State*, 7 Lea, 408.

In *Mooney v. State*, cited above, the Court said: “We have often held that such fees are not given by implication.”

Nor is the clerk of the Supreme Court entitled to the six per cent. authorized by statute to the clerks of the Circuit Courts on money received by them from delinquent collectors, reported to the

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Comptroller and paid into the State treasury. *Baxter v. Comptroller*, 14 Lea, 122.

So, the salaried recorder and policeman of a city, invested by law with the jurisdiction and power of Justices and constables, respectively, are not entitled to receive, in addition to their salaries, the fees fixed by law for Justices and constables for like services. *Johnson v. State*, 94 Tenn., 499.

The county is not legally liable to a member of the County Court for such services performed as chairman of a special committee as are paid for by the ordinary compensation allowed the Justice of the Peace, even where the services performed were onerous and faithfully performed, and upon the reliance of special remuneration. *Hope v. Hamilton County*, 17 Pickle, 325; *Holtzclaw v. Hamilton County*, 17 Pickle, 338.

So a back tax attorney cannot retain his fees for sales of land under Chapter 120, Acts of 1895, bid in for the State, out of the State and county revenues in his hands, collected out of other delinquents, but must await collection of his reasonable fee out of proceeds of land when sold by the State.

In that case it was said: "It is the settled policy of this State, fixed by statute, and enforced by the decisions of this Court, that no public officer shall receive fees or other compensation for any service further than is expressly

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provided by law." *State v. Murphy*, 101 Tenn., 515.

It follows, therefore, that it being by law the duty of the complainant, McHenderson, to prosecute the Hayes suit, he is not entitled to a decree in this cause for the services thus rendered.

It also follows that the other complainants are not entitled to a decree, either directly or through the complainant, McHenderson, as, all other questions aside, they are not entitled to recover for services rendered the county which another person, to-wit: the District Attorney, was under legal obligation to perform.

This principle was settled in the recent case of *State v. Spurgeon*, in which it was held that the Comptroller, having no power to employ counsel to assist the attorney-general in his duty of prosecuting the State's civil litigation in the Supreme Court, the attorneys so employed were not entitled to a lien for fees for such services upon the State's recovery. *State v. Spurgeon*, 15 Pick., 659.

We are of opinion that it does not matter that the suit was brought in the Chancery Court by bill rather than in the Circuit Court by motion. The motion is a summary remedy given by statute in order to more promptly realize the revenue that may be withheld. But it is not the only remedy, and if from the nature and complication of the litigation it may be best or most convenient that the suit be prosecuted in chancery, it

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does not absolve the District Attorney from his official duty to bring the defaulter to settlement.

The statute which fixes the fee of the District Attorney does not limit it to service rendered in any particular Court nor to any special proceeding, but applies broadly to any action prosecuting to judgment any delinquent collector of public money and his sureties, and expressly provides that no other fee or commission shall in any case be allowed District Attorneys for their services in the collection of public revenue. Shannon, § 962.

It is true that the Legislature has from time to time, and especially since the passage of the Acts of 1895, provided a system of collecting back taxes through special agents and attorneys, to be appointed by the Comptroller, but it has never repealed the Acts making it the duty of District Attorneys to bring defaulting officers to settlement, and that duty still devolves upon them whether performed or neglected. Nor can the fact that District Attorneys have for years failed to comply with the requirements of the law annul the law itself nor relieve them from their duties thereunder. It being the official duty of the District Attorney to bring the delinquent Trustee to settlement, he could only act officially in the matter, and could not be employed as an individual for a stipulated compensation to do that which the law imposed upon him as an official and for which it fixed the amount of fees.

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Speaking specially as to the claim of Mr. Hicks, the Court of Chancery Appeals find that, previous to rendering services in this Hayes case, he had been employed by the County of Anderson at a fixed salary of \$150 per annum, and this amount was due and paid to him during the continuance of the Hayes litigation. It does not appear that his duties were marked out or limited by any contract or agreement, but that he was employed generally as County Attorney. This being so, it was his official duty to represent the county in its litigation with Hayes and his sureties in connection with the District Attorney-general, and to render such services in an official capacity and under his employment as County Attorney, and the same rule must apply to him as to Gen. McHenderson—that he cannot be employed as an individual to do that which was demanded of him in an official capacity.

It cannot alter the rule of law as to either of these officials that the value of their service was far beyond the compensation provided by statute. This state of affairs frequently occurs with all officials, that in the discharge of their official duties they may be called upon to perform labor for which the law does not provide adequate compensation, but this does not entitle them to additional compensation, either upon an implied promise or upon an express agreement, which they are not qualified or authorized to make. Public office

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is taken and held with the emoluments and burdens which the law imposes, and the burdens are or may be far beyond the compensation allowed in many cases. But this gives no valid claim for additional compensation. *Hope v. Hamilton County*, 17 Pickle, 325; *Holtzclaw v. Hamilton County*, 17 Pickle, 338.

We are unable to see any valid legal ground upon which a recovery can be had in this case for either of these attorneys, notwithstanding the able, zealous, and efficient service rendered by them respectively and collectively. Mr. Holloway can be entitled only through his partner, McHenderson, and his claim must fail with that of McHenderson.

It follows that the decree of the Court of Chancery Appeals must be reversed and the bill of complainants dismissed at their cost. The County of Anderson is entitled to the relief sought under its cross bill, and all costs incident to that must also be paid by complainants.

Baker v. Mitchell.

BAKER v. MITCHELL.

(Knoxville. November 17, 1900.)

1. CHANCERY COURT. *Has not jurisdiction of contest over Mayor's office.*

The Chancery Court has not jurisdiction to try a contest over the election of Mayor of a city. The Circuit Court takes jurisdiction of such contests, under that provision of the Code conferring jurisdiction upon that Court in all cases where it is not conferred upon another tribunal. Such contest is not a "cause" within the Act of 1877 enlarging the jurisdiction of Chancery Courts.

Act construed: Acts 1877, Ch. 97.

Code construed: § 6063 (S.); § 4997 (M. & V.); § 4225 (T. & S.).

Cases cited: Shields v. Davis, 103 Tenn., 538; Boring v. Griffith, 1 Heis., 456.

2. JURISDICTION. *Question of, when made.*

Objection for want of jurisdiction of the subject-matter by a Chancery Court may be made at any time, and cannot be waived by consent, appearance, plea, or answer.

Cases cited: Lowe v. Morris, 4 Sneed, 68; Merchant v. Preston, 1 Lea, 280; Starnes v. Newsome, 1 Tenn. Ch., 245.

FROM GREENE.

Appeal from Chancery Court of Greene County.
JOHN P. SMITH, Ch.

Baker v. Mitchell.

HARMON & SWINGLE, SHOUN & SUSONG for Baker.

KIRKPATRICK, BOWMAN & WILLIAMS, DEADERICK & EPPS and JAS. ARMITAGE for Mitchell.

WILKES, J. The principal question involved in this case is whether the Chancery Court has jurisdiction to try a contest over the election of mayor of the town of Greeneville, Tennessee.

The Chancellor decided in favor of the jurisdiction, and heard the case upon its merits. The Court of Chancery Appeals decided against the jurisdiction and dismissed the bill, and complainant Baker appealed to this Court and assigned errors.

We are of opinion the Chancery Court has no jurisdiction of a contest over the election of a mayor. By the statute, Shannon, § 6063, it is provided that "the Circuit Courts of the State are Courts of general jurisdiction, and the Judges thereof shall administer right and justice according to law in all cases when the jurisdiction is not conferred upon another tribunal."

There being no express provision conferring jurisdiction upon any other tribunal in the trial of contested elections of mayors in our statutes, that jurisdiction and power vests in the Circuit Court under this statute.

The Act of 1877, Chapter 97, enlarging and extending the jurisdiction of the Chancery Court, does not confer jurisdiction on it in a proceeding

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of this character. It is not a "cause" within the meaning of that Act. *Shields v. Davis*, 19 Pick., 538; *Boring v. Griffith*, 1 Heis., 456.

The case of the City of Nashville, 6 Lea, 337, is not in point. It was commented upon and distinguished in the case of *Shields v. Davis*, 19 Pick., 545, and what is there said is applicable in the present case.

It is said the question of jurisdiction was waived in the Court below. A demurrer was filed raising the question of jurisdiction, but an answer on the merits was filed at the same time, and it is insisted the demurrer was waived by the answer.

It appears that before the case was heard on the merits, the defendant moved the Court for leave to withdraw the answer if the Court considered it as interfering with the question of jurisdiction. The Court held that the question of jurisdiction was then open on the record, and that it had jurisdiction, and having so decided, proceeded to hear the case on the merits.

We are of opinion that the question as to jurisdiction in this case is one based upon the subject-matter of the controversy, and not the person of the defendant or the local status of the litigation, and that it could be made at any time. *Lowe v. Morris*, 4 Sneed, 68; *Merchant v. Preston*, 1 Lea, 280; *Starnes v. Newsome*, 1 Tenn. Chan., 245.

Indeed, the want of jurisdiction of the subject-

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matter could not be waived, nor could it be conferred by consent, appearance, plea, or answer, if it does not exist by law. See cases collated Webb & Meigs Digest, p. 2058, sec. 11.

We are of opinion there is no error in the decree of the Court of Chancery Appeals, and it is affirmed.

Harper v. Lovell.

HARPER v. LOVELL.

(Knoxville. November 17, 1900.)

1. GUARDIAN AND WARD. *Guardian's liability.*

A guardian cannot be held by the administrator or next of kin of his deceased ward to account for a fund consisting of a legacy to the ward, which, as to the corpus, had been, without authority, paid over by the executor to the guardian, and, as to the interest, had been exhausted by the guardian in supplying the ward with necessaries, where, by the terms of the will, the corpus had reverted to testator's estate upon the ward's death before attaining his majority.

Cases cited: *McAlister v. Olmstead*, 1 Hum., 210; *Galbraith v. State*, 10 Lea, 574.

2. WILL. *Legacy reverts to testator's estate, when.*

Under the terms of the will set out in the opinion, the principal of the legacy to the ward reverted, on his death before his majority, to the testator's estate, the ward or his guardian being entitled only to the interest that accrued thereon in the ward's lifetime. (*Post*, pp. 615, 617, 621, 622.)

FROM COCKE.

Appeal from Chancery Court of Cocke County.
JOHN P. SMITH, Ch.

W. J. MCSWEEN for Harper.

W. H. JONES and WASHBURN, PICKLE & TURNER for Lovell.

WILKES. J. This is a bill by the administratrix of John F. Harper to recover from his former guardian a sum of money which it is alleged is, or ought to be, in the hands of the

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guardian belonging to the ward at the time of his death.

The Chancellor, upon an adjustment of the guardian's accounts, gave judgment for \$737.96 in favor of complainant, and the guardian appealed. Upon hearing in the Court of Chancery Appeals the judgment of the Chancellor was reversed, and complainant's bill was dismissed, and she has appealed to this Court. The complainant is the mother as well as the administratrix of her son, and is entitled to whatever estate the son has, and recovery is sought in both rights. The ward, John F. Harper, was the bastard son of A. Ramsey, who died after making his will, never having been married. In his will he gave to John F. Harper \$2,500 upon certain terms and with certain limitations, as follows: "The interest on the share of John F. Harper shall be paid to him only when he becomes twenty-one years of age, by my executor, the interest to be paid annually for his benefit. But in the event of his death before he becomes of age, his share shall revert to my estate, but no power of sale, assignment or transfer shall exist on his part of his interest or legacy in my estate, and my executor will not recognize any such sale or assignment if made, and will pay the legacy only to him in person as herein provided, to him or his heirs only."

The estate of Ramsey proved insufficient to pay

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all the legacies, and only about twenty per cent. has been paid. Lovell qualified as guardian of John F. Harper in 1892, and received from the executor of Ramsey \$666.86 in March, 1894. It was paid to him in this way: He bought some of the real estate of Ramsey when it was sold by his executor and gave his note for it, and this note was given up to him as a payment by the executor of that amount to him as guardian. The executor states that the reason he thus put the fund into the hands of the guardian was that the legatee could have something to live on. He does not appear to have considered whether he was paying the sum as interest on the legacy due the ward or as part of the principal, and the guardian does not appear to have considered that feature of the case. The Court of Chancery Appeals reports that the important questions submitted to it are (1) whether the sum paid to Lovell as guardian was paid to him as interest on his legacy or as a part of the principal; (2) whether the guardian was authorized to expend upon his ward any more than the income or interest on the funds in his hands, and if so, were the amounts expended by him paid for necessities such as the Court of Chancery Appeals would have approved if application for that purpose had been made to it in advance; (3) can the defendant have credit for the items without filing a cross bill; (4) if the amounts paid the guardian

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was upon the principal of the legacy given to his ward by the will of Ramsey, is the guardian liable to complainant for any part of it, his ward having died before he became of age.

The Court of Chancery Appeals was of opinion that the executor of Ramsey, under the terms and conditions of the will which we have set out, had no authority to pay to the guardian of Harper anything except the interest on the legacy previous to Harper's arrival at age, and that if the legatee, Harper, died before reaching 21 years of age, the legacy was to revert to the estate of Ramsey.

It is insisted by counsel that if the guardian received the fund as the fund of his ward, he is estopped to deny that it is his estate, and the Court of Chancery Appeals hold this contention well made, citing *McAlister v. Olmstead*, 1 Hum., 210; *Galbraith v. The State*, 10 Lea, 574.

But that Court also reports that this holding does not settle the question whether the amount was paid as principal or interest, and it reports as a conclusion that it is not material whether it was paid as principal or interest, that it was the duty of the guardian to properly manage the same and to account for it.

It is assigned as error that the Court of Chancery Appeals should have held that this fund was paid to the guardian or arranged with him as part of the principal of the legacy given to the

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ward, and only the interest on it could be legitimately consumed for the ward's expenses without first obtaining the sanction of the Chancery Court to trench on the corpus, if the corpus could be reached at all; that the expenditures made were not proper, and that no allowance should be given the guardian for his services. This is a summary of the several assignments made.

It appears that the ward had no other property than this amount coming to him from the estate of Ramsey, that he was a reckless, dissolute character, who would not work, and was killed before he reached twenty-one years of age. It also appears that the guardian had a store, and furnished to the ward articles out of it until he consumed in amount more than the guardian ever received, and that the ward was due him in some amount before he ever received any fund. The Court of Chancery Appeals reports that many of the articles furnished were, or could be considered, necessities and some should not, but upon an examination of the entire list that Court was satisfied that the legitimate expenses of the ward, together with a reasonable compensation for his services, more than cover the amount received from Ramsey's estate, and this being apparent from an inspection of the account and list of expenses, a reference was not necessary. It appears that the guardian sent the boy to school so far as he could prevail on him

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to go, and paid some school bills and for books and clothes.

A petition to rehear was filed in the Court of Chancery Appeals, in which that Court was requested to make part of its report an itemized account of the articles furnished to Harper from Lovell's store.

The Court of Chancery Appeals declined to do so, stating that there were over two hundred items in it, and that it covered seven legal record pages, and it did not consider it proper to set out in so much detail the evidential facts upon which it based its conclusions, but only the result of its finding. That Court gives, however, a sort of summary of the articles furnished, as follows:

Tobacco was furnished 86 times, smoking tobacco 9 times, pipes 3 times, candy 48 times, sardines 24 times, knives 9 times, neckties 9 times, canned peaches 11 times, cheroots 10 times, oysters 46 times, apples 5 times. That Court reports also that it is impracticable to get the exact charge for separate items, as several would be grouped in one entry—for instance, oysters and sardines, 20 cents. How much was for oysters and how much for sardines, that Court cannot tell. Also 15 cents for sugar and snuff—how much for each could not be stated. Sugar and crackers, 10 cents, candy and tobacco 15 cents, candy and oysters 15 cents. They find, however, that \$9.15 is charged for tobacco, \$5.65 for oysters, \$3.75 for sardines, \$4.50

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for candy, \$2.90 for canned peaches, \$3.37 for cigars and cheroots, \$3.35 for neckties, \$3.35 for pocketknives, \$2.10 for pin breastpins and one scarf pin, \$25 for a double-barreled gun, \$3.66 for shot, powder, and shells, 20 cents for cologne, 30 cents for hair dye, \$1.25 for fish hooks, \$1 for kid gloves, \$1.50 for a pair of slippers for his sister, bay rum 30 cents, watermelons 43 cents, hair oil 15 cents. The Court reports that the boy was about 18 years old, that he had no home and no business, and would not work, and could not be controlled, and was generally worthless and reckless. The Court of Chancery Appeals report that among the necessities might be classed oysters, sardines, crackers, canned peaches and a moderate supply of candy, as they were food, though not of the most wholesome kind; also the gun, ammunition, and handkerchiefs and a small amount of cash, schooling, clothes, etc., and other items were classed as necessities as to which no serious question is made.

That Court protests against the following articles as not articles of necessity: Cigars and cheroots, hair dye, hair oil and bay rum, breastpins; that neckties, pocketknives and candy were furnished too lavishly. Kid gloves and slippers were placed under the ban, as was also tobacco, two quarts of chestnuts, cinnamon oil, onions, and honey. On this last item that Court says that separately they might be allowed, but in combination they cannot.

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Chewing gum, cologne, rat poison, two watermelons in one day—that Court was of opinion one might be allowed, but two were not necessities, but extravagances.

The Court of Chancery Appeals was divided or in doubt as to the following items: Fishhooks, a trot line, tobacco in even moderate quantities, one box corn salve, and some other items of less importance.

That Court, however, repeats its former holding that, eliminating all proper charges and allowing a reasonable compensation for services, there were legitimate credits for enough to cover all the fund received by the guardian.

Under the view that we take of the case, it is not necessary that we pass upon the correctness of the classification made by the Court of Chancery Appeals as to what are or are not necessities. The language of the will of Ramsey under which the legacy was raised is quite crude and inconsistent, and not altogether intelligible, but we think that, under a proper construction of the item giving this legacy, neither the principal sum of \$2,500 nor any part of it was to become the absolute property of John F. Harper until and unless he reached his majority of 21 years, and in the event of his death prior to that time, the principal of the legacy was to revert to the estate of Ramsey the testator. This being so, the guardian could consume no more than the interest

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upon the legacy for the benefit of the ward, and the principal would revert to the estate of Ramsey. The complainant, claiming as the administratrix and distributee of her son, would have no right to any of the principal fund, and, indeed, to none of it unless some part of the interest upon the legacy might have been unconsumed. It is apparent from the report of the Court of Chancery Appeals that such is not the case. It follows that the complainant cannot recover the principal sum whatever it may be, and she has, therefore, no right to any recovery against the defendant, whatever may be the rights of the estate of Ramsey, which we do not determine, as that estate has no representative before the Court. It follows that we reach the same result as to complainant's rights as did the Court of Chancery Appeals, but upon different grounds, and the complainant's bill must be dismissed at her costs.

Railroad v. McCollum.

RAILROAD v. MCCOLLUM.

(Knoxville. November 17, 1900.)

1. PLEADING AND PRACTICE. *Pleas in abatement and in bar at same time.*

Under the statute authorizing pleas in abatement and in bar successively or at same time, the plea of tender does not overrule or waive a plea in abatement. Tender is a plea to the merits and within the statute. (*Post. pp. 624-626.*)

Act construed: Acts 1897, Ch. 121.

Case cited: *Tiernan v. Napier*, 5 Yer., 413.

2. SAME. *Same.*

Under that provision of the statute authorizing pleas "both in abatement and in bar at the same time," without waiver of the former, which requires that "both pleas shall be heard at the same time, and judgment rendered on each plea," proper practice requires that the jury, in every case, return a verdict on the issues made up on both pleas, even if the plea in abatement is determined in favor of defendant, and that the Judge render such judgment as these findings of the jury demand. (*Post, pp. 626, 627.*)

FROM KNOX.

Appeal in error from Circuit Court of Knox County. Jos. W. SNEED, J.

W. D. WRIGHT for Railroad.

TAYLOR & CULTON for McCollum.

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SNODGRASS, C. J. The only question to be determined in this case is whether the Court erred in refusing to allow the plaintiff in error to offer proof in support of its plea in abatement. Issue had been joined on this plea, but the defendant, admitting that it owed the plaintiff below \$19.35, amount of overcharge in freight, one of the items of plaintiff's claim, filed a plea of tender accompanied with this amount of money. The Circuit Judge held that the effect of this plea was to overrule the plea in abatement, and declined to allow proof on the plea. Defendant appealed, and assigned this as error.

Against this assignment of error the plaintiff relies on the Act of 1897. This Act is Chapter 121 on page 277 of the published Acts of that year. Its caption is: "An Act to permit a defendant to plead to the merits in any suit where a plea in abatement has been overruled, and to permit a plea in bar to be filed at the same time of the filing of plea in abatement, and to provide how the issues are to be tried." The Act is as follows:

"Sec. 1. *Be it enacted by the General Assembly of the State of Tennessee*, That a defendant has the right, upon the overruling of a plea in abatement for any cause filed by him to any action, to plead to the merits, and rely upon any defenses as if said plea had not been interposed.

"Sec. 2. *Be it further enacted*, That a defend-

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ant can, in any suit, plead both in abatement and in bar at the same time, and that said plea in bar is no waiver of the plea in abatement, and when so pleaded, both pleas shall be heard at the same time and judgment rendered on each plea."

This Act was passed March 27, 1897, approved April 29, 1897, and took effect from and after its passage.

The Circuit Judge was of the opinion that a plea of tender did not come within the literal meaning of the Act, and that such a plea was a waiver of the plea in abatement. It will be noticed that in the first section defendant was given the right, upon the overruling of a plea in abatement, to plead to the merits and rely upon any defenses as if said plea had not been interposed.

The second is not so broad in its terms, but we think must have the same construction, and that the plea of tender may well be made under the provisions of the Act, without waiving the plea in abatement. The plea of tender is a plea to the merits. "Whatever the law might formerly have been, the plea of tender," as said by this Court in the case of *Tiernan v. Napier*, "it is now considered as a fair and honest plea to the merits of the action . . . and as an issuable plea." This was said in answer to the argument that a plea of tender was a dilatory and unfavored plea. 5th Yer., 413.

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The spirit and intent of the Act seems to be to do away with the former necessity of standing by pleas in abatement and succeeding or failing upon that defense alone in a single issue, and to give the parties the right to do all their pleading at the same time if they wished.

The Act, we think, needs construction not only on this point, but upon the practice of verdict and judgment on said pleas when they are both in abatement and to the merits.

The question of practice suggested is to be determined by a proper construction of the phrase, "both pleas shall be heard at the same time and judgment rendered on each plea." This says nothing about a verdict, but it must follow that the Act contemplated, there should be a verdict on both pleas, even though the plea in abatement, which should be first considered and acted upon, were determined in favor of the defendant.

When the case is tried by a jury, the jury should, therefore, be instructed to find the issues on the plea in abatement, and though they should find that plea in favor of the defendant, they should, nevertheless, find on the plea to the merits and report. If the Judge understands the finding on the plea in abatement to be correct and approves it, he would thereupon render proper judgment dismissing the suit, and render judgment denying relief on the plea to the merits. Or, rather, he should render judgment in favor of the

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defendant, dismissing the suit, and by reason thereof decline judgment in favor of either plaintiff or defendant, as the verdict might have indicated on the second plea.

We are of opinion, therefore, that this case should be remanded for a new trial, to the end that defendant might have the opportunity of making his defense on the plea in abatement. In a case of a plea of tender like this, we see no reason why the Court might not, if that issue was found in favor of defendant, treat this as submission to such judgment by defendant and declare the plaintiff entitled to the money tendered. Judgment will therefore be reversed and the case remanded for a new trial. The defendant in error will pay the cost of appeal.

Railroad v. Cargille.

RAILROAD v. CARGILLE.

(*Knoxville*. November 17, 1900.)

1. PLEADING AND PRACTICE. *Making issue on amended declaration.*

When a case is tried upon an issue made upon the original declaration, and without plea to an amended declaration restating the original cause of action, but without objection on that account, this Court will treat the amended declaration as being incorporated with the original declaration, and as put at issue by the pleas offered to the original declaration.

2. RAILROADS. *Turntables.*

A railroad company that maintains a turntable, or other machinery of like attractive and dangerous character, in a position exposed and accessible to children, and in such condition as to be set in motion by them, is liable for any damages to a child of tender (6) years injured by the action of himself and companions in setting such machinery in motion.

FROM WASHINGTON.

Appeal in error from Circuit Court of Washington County. H. T. CAMPBELL, J.

H. H. CARR for Railroad.

BURROW BROS. and ISAAC HARR for Cargille.

WILKES, J. This is an action for damages for personal injuries to the plaintiff, who was at the

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time of the accident a minor six years of age, and at the time of bringing this suit was still a minor.

There was a trial before the Judge and a jury in the Court below, and a verdict and judgment for \$250, and the railroad company has appealed, and assigned errors. The injury was done in 1886. This suit was brought in 1895. The declaration was filed August 26, 1895. It was demurred to. When this demurrer was filed does not appear, but it was overruled December 17, 1895. A plea of not guilty was filed December 21, 1895. The cause appears to have slumbered on the docket until April 17, 1899, when an amended declaration was filed. It was also demurred to on the day it was filed, and the second demurrer was overruled on April 18, and defendant was given thirty days in which to plead to the second count. No plea to this second count was ever filed, nor was judgment by default taken upon it, but the cause proceeded to trial as the entry states upon the issues, with the result as stated. A motion for a new trial was made and overruled, and an appeal was prayed and granted, and time given to file a bill of exceptions, but none was ever filed. Defendant excepted to the action of the Court in overruling his demurrers. There being no bill of exceptions in the case, the action of the Court upon the demurrers is the only matter we can consider.

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We are of opinion the amendment to the declaration incorporated itself into the original and became part of it, and the defendant having filed no other or further plea to it, the plea to the original declaration will be treated as putting the entire matter of both declarations in issue.

The original declaration in substance alleges that the railroad company wrongfully and negligently left unattended, unlocked, unfastened, unguarded, and uninclosed a certain piece of dangerous and attractive machinery, viz.: a turntable, and it was its duty not to so leave it, but to keep the same well secured against those for whom it served as an attraction, thereby holding out to plaintiff and others an inviting and attractive piece of dangerous machinery—viz., a turntable, a ponderous piece of machinery resting on a pivot and easily revolved, being on wheels at each end; that plaintiff, being an infant of tender years (six years), in company with his mates, while playing with and revolving the table, was caught between the end of the turntable and the end of the iron or steel rail, whereby his foot was mashed, bruised, mangled, etc.

The amended declaration further alleged that the turntable was located in the central part of the town of Johnson City, near the intersection of two public streets, and at a place much frequented by people in passing and repassing, with full knowledge that the same was an inviting and dan-

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gerous piece of machinery when unlocked or unguarded, and with full knowledge that small boys and youths were in the daily habit of riding and revolving on the same, whereby and by reason of the negligence of defendant in not taking reasonable precaution for preventing small boys from playing upon and about its turntable, and in not locking and securely fastening the same, the plaintiff's foot was caught and crushed, etc.

The demurrers were, in substance, that the declaration was not sufficient in law, there being no cause of action stated, the law not requiring defendant to keep its said turntable locked, fastened, guarded and inclosed, nor to keep the same well secured against those for whom it served as an attraction, etc.

It is objected that the demurrer is formal, and does not specify the defects in the declaration. This, we think, is not correct. The demurrer is sufficient and regular in form, and we proceed to consider if it is sufficient in substance.

The general rule adopted by the Supreme Court of the United States and the Courts of most of the States of the Union is that if a railroad company leaves a turntable or other like machinery upon its own property or under its control, likely to attract children, so unsecured that children may put it in motion, the company is negligent, and if a child is injured thereby, will be liable in damages. *Stout v. Railroad*, 17 Wall., 657; 27

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Am. & Eng. Enc Law, 344, and cases there cited.

The declaration is not, therefore, faulty upon the grounds stated in the demurrer, and we can see no error in the action of the trial Judge in overruling the demurrers and proceeding to trial upon the original and amended declarations and the plea thereto, treating it as putting both the original and amended declarations in issue.

There being no bill of exceptions we must assume there was no error in the trial, verdict, and judgment, and the judgment is affirmed with costs.

Chandler v. Johnson City.

CHANDLER v. JOHNSON CITY.

(Knoxville. November 17, 1900.)

1. MUNICIPAL CORPORATIONS. "*Ordinance*" synonymous with "*resolution*."

"Ordinance" is used in the sense of "resolution," where a city council, acting under a charter that requires ordinances to be passed three times on three different days, enacts that the salaries of officers elected by itself shall be fixed by "ordinance" instead of "resolution," to be passed on a single reading at one meeting.

2. SAME. *Recorder's salary.*

Under a city ordinance that provides that the Recorder's salary shall be fixed by the city council at the first meeting after their qualification and before his election, and not thereafter changed during his term, the Recorder cannot claim any salary not fixed in accordance with such ordinance. He cannot claim the amount of salary fixed for his predecessor, especially where he has accepted the amount fixed by resolution of the council after his election, but before his qualification.

FROM WASHINGTON.

Appeal from Chancery Court of Washington County. JOHN P. SMITH, Ch.

H. H. CARR and G. T. LEE for Chandler.

ISAAC HARR and S. E. MILLER for Johnson City.

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WILKES, J. This is an action to recover from the town of Johnson City an amount claimed by complainant to be due him as Recorder.

There was a demurrer to the bill, which was sustained, and it was dismissed, denying all relief, and complainant appealed. The cause has been heard by the Court of Chancery Appeals, and that Court affirmed the decree of the Chancellor, and complainant has appealed to this Court, and assigned errors.

The bill avers that complainant was elected Recorder of Johnson City on the 1st day of April, 1896, that the salary of the Recorder had been fixed at \$600 per annum in 1894, and two different recorders had thereafter been elected and paid that compensation; that on the day next after complainant's election the Board of Mayor and Aldermen passed a resolution that the salary of the Recorder for the ensuing term of two years should be \$500 per annum, that this resolution was not in force when complainant was elected, and that the board had no right or power to change the salary after the complainant had been elected to the office.

It is further alleged that there was an ordinance of the city which provided that the Board of Mayor and Aldermen, at their first meeting after qualification in each year, and before any subordinate officers should be elected, should fix by ordinance the salaries to be paid to such officers,

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which should not be increased or diminished during their term of office. The bill further avers that the term of office began on the first day of April, notwithstanding the complainant was not inducted into it until the 2d.

Complainant further avers that he made demand for his salary at the rate of \$600 per year, but the Board refused to pay it, and informed him that if he was not satisfied with the salary as fixed at \$500 he could resign, but that, being a poor man, with a family to support, he could not afford to do this, and so accepted payment under protest at the rate of \$500 per annum, or \$41.66 per month.

In an amended bill he avers that the charter of Johnson City was granted by the General Assembly in 1893, and that it provides that the Board of Mayor and Aldermen on the first Monday in April, 1894, elect a Recorder, and for each second year thereafter, whose term should be two years, and that the salaries and fees of officials shall be fixed by the Board, but that the salaries and fees of the Recorder should not exceed \$1,200 per annum in the aggregate; that the Board passed a code of laws which provided that it should, at the first meeting after their qualification and election, elect a Recorder to serve for two years, and that the Board at its first meeting after qualification in each year, and before any subordinate officers are elected, shall fix

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the salaries of the officers, which salaries shall not be increased or diminished during the term of the incumbent. Copies of these ordinances are attached as exhibits to the bill.

It is alleged that the failure of the Board to fix any salary for complainant before his election, showed it be the intention and purpose to allow the salary then existing to remain unchanged during his term. It appears from the bill and exhibits that on the 4th of April, 1894, the salary of the Recorder was fixed at \$600 per annum, that the complainant was elected April 1, 1896, that on the 2d of April, 1896, the salary was fixed at \$500 per annum, and that after the change the complainant accepted the office and was inducted into it and qualified and served during the term, and received the compensation at the rate of \$500 per annum under protest.

The first assignment of errors is as to the technical language of the demurrer, which is that the Board of Mayor and Aldermen under the charter and ordinance had the authority and power to fix the fees and salaries of all officials elected or appointed by the Board, it being the duty of each Board, under the ordinance set out, to fix the compensation of its own appointees, and having fixed the compensation at \$500 per annum, complainant is bound by it, and, second, that having accepted payment at that rate, he is estopped from claiming more.

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The first ground of demurrer is somewhat ambiguous and capable of two different constructions, but we are of opinion it sufficiently raises the question of the legality of the action of the Board which is complained of.

There is a contradiction between the charter of the city and its ordinances in this, that the ordinance provides that the Board of Mayor and Alderman shall, at its first meeting after the election and qualification, fix the salaries of officers by ordinance, while the charter provides that all ordinances shall be read three times on three different days before they become laws. It is evident that the word "ordinance," as used, was intended to be synonymous with "resolution," and the exhibits filed with the bill show that previous to the election of complainant the incumbent's salary had been fixed by motion or resolutions in open Board.

If it be insisted that the Board should at its first meeting fix the salary by ordinance, then it is evident this has not been done, and the complainant cannot recover upon this theory; and if it be contended that the former salary was continued, complainant is confronted by the provision that each Board should fix the salaries of its own officers by ordinance. It is, we think, evident, or may fairly be presumed, that the meeting of the 2d of April was but an adjourned or continued meeting from the 1st, as regular, periodical meetings of the Board would not be held so near

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together. The charter provides that the regular meetings of the Board should be held on the first and third Thursdays of each month, and the bill does not aver that these two meetings on the 1st or 2d of April were regular meetings or separate sessions. We conclude that the fixing of the Recorder's salary in 1894 did not have the effect of a formal ordinance or law; that it was a substantial compliance with the general ordinance requiring the salary to be fixed in advance of the election, that it should be fixed before the party elected had qualified and been inducted into office, and, as was done in this case, within twenty-four hours after the election. The salary having been thus fixed, as we think, substantially correctly, and the complainant having afterward qualified, been inducted into office and having continued therein and received the salary of \$500 per annum, is estopped to claim more.

We are of the opinion there is no error in the decree of the Court of Chancery Appeals, and it is affirmed.

Railroad v. Lawson.

RAILROAD v. LAWSON.

(Knoxville. September 22, 1900.)

1. WITNESS. *Corroboration of, by proof of consistent statements.*

Previous statements of a witness, consistent with his testimony, made immediately after the occurrence about which he testifies, and before the alleged inducement to speak falsely had intervened, are competent, in corroboration of his testimony, when the manifest purpose and tendency of the cross-examination are to impress the jury that he had been induced to give evidence favorable to the opposite party by the payment or promise of a bribe. (*Post*, pp. 640-642.)

Cases cited: *Dossett v. Miller*, 3 Sneed, 76; *Glass v. Bennett*, 89 Tenn., 478; *Hays v. Cheatham*, 6 Lea, 10; *Queener v. Morrow*, 1 Cold., 134; *Bank v. Hall*, 1 Bax., 484; *Graham v. McReynolds*, 90 Tenn., 697; *Bradshaw v. Jones*, 103 Tenn., 338.

2. SUPREME COURT. *Will not reverse on account of loose statements of trial Judge.*

It affords no ground for reversal of a judgment that the trial Judge, in refusing a new trial, indulged in a loose, rambling talk about the case, giving expression to some unfortunate remarks about the state of his mind, and about his personal knowledge of the character of one of the witnesses, where it appears that his action was based on legal grounds, and that he was satisfied with the verdict, upon a review of the whole case. (*Post*, pp. 642-645.)

3. VERDICT. *Of five hundred dollars, supported by the evidence.*

The Court finds the evidence, commented upon in the opinion, sufficient to support a verdict for five hundred dollars for personal injuries. (*Post*, pp. 645-647.)

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

Railroad v. Lawson.

BROWN & SPURLOCK for Railroad.

W. T. MURRAY for Lawson.

WILKES, J. This is an action for damages for personal injuries. There was a trial before the Court and a jury, and a verdict and judgment for \$500, and defendant railway company has appealed, and assigned errors.

The first error assigned is to the admission of the testimony of a witness, Kline, who purports to give previous statements of the witness, Louise Link, confirmatory of what she swore upon the trial. The witness, Louise Link, testified to having seen the plaintiff struck by the defendant's engine. She was rigidly cross-examined by the defendant's counsel, and was asked if she had not come from Kentucky in order to testify in this case for plaintiff, and if she had not been paid to testify, and if she had not been promised a reward, and a part of the recovery for testifying as she did. The entire cross-examination was calculated and unquestionably intended to impeach her character for credibility, and discredit her testimony. It is insisted that previous confirmatory statements are allowable in cases where the witness has made other statements in consistent with those made in Court, in which case it is permitted to introduce evidence that on previous occasions the witness had made statements consistent with his testimony given in Court. This is the rule as laid down in *Dossett v. Miller*, 3 Sneed,

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76, but it has not been confined alone to this class of cases, but it is extended to instances where a design to misrepresent is charged upon the witness in consequence of his relation to the party or cause or because of a newly acquired interest in the matter in controversy. See, also, *Glass v. Bennett*, 89 Tenn., 478; *Hays v. Cheatham*, 6 Lea, 10; *Queener v. Morrow*, 1 Cold., 134; *Bank v. Hall*, 1 Bax., 484; *Graham v. McReynolds*, 6 Pickle, 697.

It has likewise been held that when the credibility of a witness is attacked by a contradiction of his testimony, it may be sustained by previous confirmatory statements made by him. *Green v. The State*, 13 Pickle, 69. And such confirmatory statements are competent when the credibility of the witness or his statements on trial are assailed by cross-examination tending to show the statement to be incorrect or the witness unreliable because of a subsequently acquired interest. *Bradshaw v. Jones*, 19 Pick., 338; 1 Greenleaf on Evidence (16 Ed.), sec. 469, pp. 605-607.

In this case the evident intention was to show that the witness was swearing under a hope of reward held out to her, and it was entirely competent in such case to show that, immediately after the event, and when it was not charged that she had been offered any inducement, she had made statements consistent with those made on the trial.

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This assignment is not well made.

It is said that the trial Judge erred in his action in overruling the motion for a new trial. The specific grounds of exception to his action are that from his statement made in disposing of the motion, it appeared that he had not made up his mind as to what he should do, and was not satisfied with the verdict; that he discredited the only evidence on which he could sustain the verdict; that he was influenced in part by the evidence of the witness, Kline, which should have been excluded; that he discredited one of the witnesses from his own personal knowledge of how he had sworn in a different case on a previous occasion; that he stated that, in order to set aside the verdict, he would be compelled to find that the lady witnesses of the plaintiff had willfully sworn falsely, which he could not do.

What the Judge did say in overruling the motion was: "In this Lawson case I have been sort of a hung jury about it; I have not really had the time to make up my mind as I would like, but this is the last day of the term, and the time has come to decide it. These women that testified about this engine running over this man are thoroughly respectable-looking women, both of them. That girl was an intelligent girl, too, but they are evidently mistaken about two very material things that they have stated. In the first place, they are evidently mistaken about having

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followed that man out there. I have got to disbelieve the testimony of all the other witnesses in the case to believe that they followed him from Ninth Street on Market on down there to where this man was hurt. And they are mistaken about the way the train was going, and about the train having two cars attached to it. That is a thing they could be mistaken about. But about seeing the man struck—that is a thing that they could not be mistaken about, if they were telling the truth. I cannot believe that these two women have perjured themselves, and there is nothing here to show that they have. This preacher says that the girl came right on out there and told him about seeing a man hurt. She is a bright-faced, sweet-looking girl, and it is contrary to all my observation in human nature to believe that a child like that—and she is nothing but a child—could be corrupted in the manner insinuated by a promise of reward for her swearing. She is positive that the man was right there at the track and she saw him get struck, and she states that her mother came very near getting struck, so much so that she had to grab her and pull her back. And to say that this verdict is not supported by the evidence I would have to say that these two women have willfully, deliberately, and corruptly sworn a lie about this transaction. This man was an entire stranger to them. They had never seen him before, and unless they had been

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hired to swear, there is no possible motive that I can see to induce them to swear to this state of facts; there is no evidence to show that they have been corrupted, and while there is a great deal of reliable testimony that is in conflict with their statement about it, still I will have to overrule the motion. I cannot believe that these two women have deliberately sworn a lie about this matter. Nobody else saw it except the flagman, and he, of course, is interested. They do not appear to be interested, while the flagman is interested in showing that he did his duty—he has that much interest in it, at least. This engineer, of course, is interested, and I know that he is an unreliable quantity. I have seen him perform before. He testified to a state of facts up here on one occasion that I knew were untrue. He is not worthy of belief at all. I will overrule the motion.”

While the language of the trial Judge is somewhat unfortunate, we think that, properly understood, it means that he would have been glad to have had more time to consider the application. But still his mind was made up that in view of evidence which he could not discredit he would be compelled to refuse the motion. That he based his action largely upon the testimony of the two ladies is apparent, and also that while he found evidence in conflict with theirs he could not question them on the main important features of the

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case. His statement, of his opinion of the engineer as a witness was also unfortunate, but it was nothing more than an expression of his opinion of his credibility. This opinion he no doubt entertained, whether he expressed it or not. The fact that it was based in part upon his appearance and testimony in a former trial to some extent was a matter which he should have excluded from consideration, but we are not to infer from this expression that he would have disregarded the statement of the witness because of this preconceived opinion if he had been satisfied he was telling the truth upon this occasion. The error of the learned trial Judge was perhaps in expressing the thoughts and processes of his own mind too freely, but we can see no reversible error in his conclusions and action in the matter. The evidence of the engineer bears upon its face evidences of contradiction and unreliability.

It is said that there is no evidence to support the verdict. In this connection it is virtually admitted that if the testimony of the ladies is to be considered as reliable, it would be sufficient, but it is insisted that it was discredited by the trial Judge, or at least so much doubt thrown upon it that it should have been disregarded by him and also by this Court. The trial Judge was of opinion they were mistaken about following the plaintiff down the track, as they testified, and also about the direction in

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which the engine was going, .but he was satisfied they saw the plaintiff struck by the engine.

We think there is perhaps more of confusion than of contradiction in the record. It is apparent that there were a number of engines and cars passing over the tracks in the locality where the injury occurred, that there were a number of tracks and a crossing, and witnesses evidently confused one with another, and testified as to different trains. The testimony of the plaintiff is almost valueless, as he was too drunk to know what he was doing, according to his own statement.

The ladies testify that they saw plaintiff struck by the engine at the crossing; that there was no flagman at the crossing or in front of the train; that no bell was sounded, no alarm was given; that the train was moving rapidly, and coming from the direction of Atlanta; and the flagman came out of his house after the accident.

The testimony of the engineer is contradictory in itself. According to his version, the plaintiff ran or staggered against the tender as it was running, and was knocked straight out from it. He admits that upon his theory he cannot account for the fact that the plaintiff's feet were crushed or hurt. The fireman gives still another version, to-wit: that the plaintiff, with the watchman, passed over the track, and the fireman says that when he last saw him he was thirty or forty feet

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in the rear of the engine after it had passed. He cannot account for the hurt. As before stated, there is much confusion in the testimony, but there is sufficient evidence to sustain the verdict.

The judgment is affirmed with costs.

Railroad v. Finney.

RAILROAD v. FINNEY.

(*Knoxville.* September 22, 1900.)

1. **VERDICT.** *When set aside on the facts.*

This Court will not reverse a verdict upon consideration of the facts alone, if there is any material evidence to support it. The trial Judge acts upon a different rule. He should set aside a verdict if satisfied that it is not justified by the facts, but he should not set it aside merely because he, trying the case originally, would have decided it differently from the jury.

Case cited: *Tate v. Gray*, 4 Sneed, 591.

2. **SAME.** *Same. Case in judgment.*

The language of the trial Judge, refusing a new trial, indicates an application of the rule appropriate to his own Court, and not of the rule peculiar to this Court, when he stated that, after excluding from consideration the statements of certain witnesses deemed utterly unreliable, "that it was a close question on the other facts in the case, and the jury having adopted the plaintiff's theory, under the well-settled rule of law, their verdict should not be disturbed."

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

PRITCHARD & SIZER for Railroad.

W. T. MURRAY and S. H. FORD for Finney.

Railroad v. Finney.

WILKES, J. This is an action for damages for personal injuries sustained by the running of one of defendant railway company's engines against the plaintiff.

There was a trial before the Circuit Judge and a jury, and a judgment and verdict for \$500, and the railway company has appealed, and assigned errors.

It is stated in the bill of exceptions that "on the motion for a new trial defendant by counsel said that two witnesses, John Brakeman and Will Finney, had appeared before the jury in such manner and made such statements that they were not worthy of any credit, whereupon the trial Judge said he would attach no weight to the evidence of these witnesses as to the material facts in the case, and on further argument and consideration he stated that it was a close question on the other facts in the case, and the jury having adopted the plaintiff's theory, under the well-settled rule of law their verdict should not be disturbed."

This action and these statements of the trial Judge are made the basis of error assigned.

The argument of counsel is that the learned trial Judge meant by this language to say that he would not disturb the verdict, inasmuch as there was some evidence to support it, and that the rule referred to by him was the rule adopted by

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the Supreme Court, not to disturb a verdict if there is any evidence whatever to support it.

We think this is not the proper construction of the language, and was not the meaning of the trial Judge, and that the rule referred to by him was not the rule adopted by this Court in regard to reversals, but the familiar rule that when there is a conflict of evidence, and the question is a close one on the facts, it is the province of the jury to decide the question, and he would not invade that province.

This is the only error assigned, and it is conceded that there is some evidence upon which the verdict can rest, though it is insisted the weight of it is largely against the verdict.

Under this view of the case, we think the assignment not well made. Caruthers' History of a Lawsuit (Ed. 1860), Sec. 386, p. 252; *Tate v. Gray*, 4 Sneed, 591.

A verdict of a jury will not be set aside merely because the Court, if trying the question of fact, would have found differently, and the verdict will not be set aside because the trial Judge differs with the jury on the merits of the case, unless the Court is satisfied the finding of the jury is not justified by the evidence. 14 Enc. of Pl. & Pr., 772.

The judgment is affirmed with costs.

Richi v. Chattanooga Brewing Co.

E. RICHIE v. CHATTANOOGA BREWING CO.

(*Knoxville*. September 29, 1900.)

1. NUISANCE. *Restraint and abatement.*

A public nuisance causing peculiar and special damage to an individual will be restrained and abated at his suit—*e. g.*, the unauthorized construction and operation by a private corporation, for its own use, of a private railroad along a public street, which not only obstructed public travel along the street, but destroyed the ingress and egress of the owner of an abutting lot.

Case cited: *Weakley v. Page*, 102 Tenn., 179.

2. SAME. *Award of damages.*

Incident to the exercise of the jurisdiction to restrain and abate a public nuisance, at the suit of an individual who has suffered peculiar and special damage therefrom, a Court of Equity will ascertain and award the damages sustained by the complainant.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

CASE & CASE for Richi.

W. T. MURRAY for Chattanooga Brewing Co.

CALDWELL, J. Bill in equity to abate a nuisance and to recover damages.

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Demurrer overruled, and defendant appealed. The decree of the Chancellor was affirmed by Court of Chancery Appeals, and defendant appealed again.

Epitomized and reduced to their essence, the allegations of the very elaborate bill are that the defendant, a private corporation, has, without lawful authority, recently constructed and is now operating a private railroad for the purposes of its private business along a portion of one of the public streets of the city of Chattanooga, thereby unlawfully obstructing public travel, creating a public nuisance, and destroying the ingress and egress of the complainant to and from his improvements now and previously standing on an abutting lot, now and for many years owned by him, to his great loss and damage. The prayer is that the alleged nuisance be restrained and abated, and that the complainant be allowed a recovery for the private injury he has sustained in consequence thereof.

The demurrer is, first, that the city or State alone, and not the complainant, can maintain a bill to restrain and abate the alleged nuisance, and, second, that a Court of Equity is without jurisdiction to assess the damages sought to be recovered.

The first assignment of demurrer is bad, because the bill distinctly alleges the continuing existence of a public nuisance with peculiar and special damage to the complainant in consequence thereof.

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It is well settled that, in such a case, the person suffering the injury may, in his own name and right, maintain a bill in equity for the restraint and abatement of the nuisance. *Weakley v. Page*, 102 Tenn., 179; 2 Beach Mod. Eq. Jur., sec. 744; 2 Story's Eq. Jur., sec. 924; 2 Am. & Eng. Decisions in Equity, 355; 2 Dan. Pl. & Pr., 1837; *Miss. & Mo. R. R. Co. v. Ward*, 2 Black, 485; *Georgetown v. Alexandria*, 12 Pet., 91-98; *Irwin v. Dixion*, 9 How., 28, 29.

The second assignment of error is likewise bad, because it is equally well established that a Court of Equity, having taken jurisdiction of the cause for the purpose of injunction, or to restrain and abate the nuisance, may decide the whole controversy, its jurisdiction to award damages being incidental to its jurisdiction of the main subject. 2 Story's Eq. Jur., sec. 796; 1 Pomeroy's Eq. Jur., secs. 181, 236, 237; *Horton v. Mayor and City Council*, 4 Lea, 50; 2 Beach Mod. Eq. Jur., sec. 538, last sentence and citations; 1 Am. & Eng. Dec. in Eq., 219; 2 *Ib.*, 661; *Hepburn v. Dunlap*, 1 Wheat., 197; *Cathcart v. Robinson*, 5 Pet., 278; *Clark v. Wooster*, 119 U. S., 322; *Gormley v. Clark*, 134 U. S., 338; *Sunflower Oil Co. v. Wilson*, 142 U. S., 313.

Affirmed.

Manufacturing Co. v. Morris.

MANUFACTURING Co. v. MORRIS.

(Knoxville. October 4, 1900.)

1. DEMURRER TO EVIDENCE. *Damages assessed upon the evidence embodied therein.*

Where a demurrer to evidence in an action involving unliquidated damages is overruled, the amount that the plaintiff is entitled to recover must be fixed upon the evidence embodied in the demurrer. Neither party has the right to introduce any further evidence on this question. (*Post*, pp. 655-659).

Cases cited: *Mitchell v. Railroad*, 100 Tenn., 333; *Hopkins v. Railroad*, 96 Tenn., 423.

2. JURY. *Oath of. Sufficient, when.*

It is sufficient to swear a jury "to well and truly try the issue joined between the parties," that is impaneled to assess damages upon the overruling of a demurrer to evidence, especially when the parties stood by and made no objection to the oath in the lower Court. The assessment of damages is an issue in such case. (*Post*, pp. 659, 660.)

Cases cited: *Looper v. Bell*, 1 Head, 376; *Tinkle v. Dunivant*, 16 Lea, 505.

3. VERDICT. *For \$7,500, sustained upon the facts.*

The Court holds that a verdict of \$7,500 for the negligent killing of a boy seventeen years of age is not so excessive, upon the facts set out in the opinion, as to evince such partiality, caprice, prejudice, or corruption on the part of the jury as justifies reversal. (*Post*, pp. 660, 661.)

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

Manufacturing Co. v. Morris.

BROWN & SPURLOCK and PRITCHARD & SIZER
for Manufacturing Co.

SHEPHERD & FRIERSON and W. T. MURRAY for
Morris.

McALISTER, J. Plaintiff recovered a verdict and judgment in the Court below for the sum of \$7,500 for the negligent killing of his intestate. The company appealed, and has assigned errors.

The first assignment of error we shall consider is that the Court erred in admitting the written testimony embodied in the demurrer to the evidence. It is necessary to explain that on the original trial of this cause in the Circuit Court a demurrer to the evidence interposed by defendant company was sustained by the Court, and plaintiff's suit dismissed. On appeal this Court at last term reversed the action of the trial Judge, and remanded the cause for assessment of damages by another jury. It was stated in the entry made at last term reversing the judgment, that the cause was remanded for the assessment of damages upon the evidence set out in the demurrer. This was accordingly done, and, as already stated, the jury assessed the damages at \$7,500. It is now objected that the Court below permitted the evidence embodied in the original demurrer to be read to the jury, excluding all other testimony. Counsel for defendant company objected to the reading of the transcript of the evidence incor-

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porated in the demurrer for the reason that it would deprive the defendant of the right to cross-examine the witnesses and of the right to offer evidence in respect of the quantum of damages or in mitigation thereof. It is insisted that the demurrer to the evidence had served its purpose and was *functus officio*, that the only issue presented by the demurrer was that of liability or nonliability, and that the question of damages was not therein involved. As already stated, the entry at last term directed that the cause should be remanded for the assessment of damages upon the evidence set out in the demurrer. This was in accordance with the rule announced in *Mitchell v. R. R. Co.*, 16 Pick., 333, in which cause this Court reversed the judgment of the trial Judge, sustaining a demurrer to the evidence, using this language, to wit: "If he (plaintiff) was guilty of any negligence to reduce the amount he might otherwise be entitled to, it was a matter for the jury, which shall assess the correct amount to be given under the facts in evidence as demurred to." That case was again before this Court at Nashville, December term, 1898, when it appeared from the record that in the assessment of damages the jury had been confined to the transcript of the evidence contained in the original demurrer, all oral testimony having been excluded and no additional evidence permitted to be heard. The correctness of this practice was vigorously assailed.

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and the same reasons, as well as the same authorities were urged then, as now, against the practice. But this Court sustained the practice, holding that no additional testimony could be presented, and the assessment of damages must be made by the jury upon the transcript of the evidence embodied in the original demurrer, and that an oral examination or cross-examination of the witnesses was not permissible. In *Hopkins v. Railroad*, 12 Pick., 423, this Court quoted with approval the following from Elliott's General Practice, vol. 2, sec. 863, viz.: "The evidence must be incorporated in the demurrer. . . . The party who prevails on the demurrer is entitled to final judgment in his favor. . . . It is not necessary that the damages should be assessed by the jury originally called to try the case, although that jury may assess them, but another jury may be called to assess the damages. If there is a conditional assessment of the damages, and the decision upon demurrer is in favor of plaintiff, he is entitled to a judgment for the amount conditionally assessed. Where the damages have not been provisionally assessed, then, as already suggested, a jury may be called to make the assessment, and judgment will be entered for the amount assessed." Elliott's General Practice, Vol. 2, secs. 869, 870, citing Troubats & Haly's General Practice, Vol. 2, p. 866, also Vol. 1; Gould's Pleading, sec. 73.

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Now, the latter practice was adopted in the present case, and the damages were assessed by a jury expressly called for that purpose after the cause had been remanded. The defendant cannot object to an assessment of damages upon a transcript of evidence which he admits by his demurrer to be true and unimpeachable. The filing of the demurrer to the evidence originally submitted by the plaintiff precluded the introduction of any additional testimony. The defendant thereby admitted that the evidence introduced by the plaintiff established the facts of the case, and the only question made by defendant was that as matter of law, these facts did not constitute actionable negligence.

It is argued that the jury called to assess the damages should have an opportunity to see the witnesses in order to weigh the testimony, but since the testimony by the demurrer has been admitted to be true, there can be no occasion for the jury to see the witnesses. The transcript of the original evidence is the recorded admission of the defendant, and is not only admissible, but the best evidence that can be produced. Again, it is argued that the original witnesses should again be examined orally, in order that defendant's counsel may have the right of cross-examination. But this right was excrised, or might have been exercised, on the original hearing. It is argued that the demurrer to the evidence only goes to the ques-

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tion of liability or nonliability. The original demurrer may either proceed upon the theory that the facts admitted do not make a case of liability, or, liability being admitted, it may deny that any damages have been shown. It is incumbent upon the plaintiff, in presenting his evidence, to make out his case, and to show both liability and damages. If he fails in either, the demurrer of defendant must prevail, and plaintiff cannot supplement his case by any additional testimony. So the defendant, by demurring, rests his whole case upon the law, and the law being adjudged against him, his demurrer is overruled, and the damages must be assessed upon the facts already in evidence. If the original record of the testimony can be opened for one purpose, it can be opened for all, and thus a controversy would be presented over every question involved in the original trial, and the office of a demurrer to the evidence thereby absolutely destroyed.

The next assignment of error is that the jury were sworn to well and truly try the issues joined between the parties, and were not sworn to well and truly assess the damages.

It suffices to say, in answer to this objection, that defendant's counsel were present when the jury was sworn, and made no objection to the form of oath administered. *Looper v. Bell*, 1 Head, 376. The rule is that in such cases a party may not sit quietly by and take his

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chances on a favorable verdict, and afterwards take advantage of such an infirmity in the proceedings. *Tinkle v. Dunivant*, 16 Lea, 505; *Seymour v. Purnell*, 23 Fla., 232.

Moreover, we do not perceive why the assessment of damages was not an issue—certainly it was in respect to the quantum of damages—the plaintiff being, of course entitled, as matter of law, to nominal damages upon the overruling of the demurrer. It is next assigned as error that the verdict of the jury was excessive. The plaintiff's intestate was a boy seventeen years of age, engaged in running a lathe in defendant's factory. In attempting to adjust the belt which ran his machine, on the pulley overhead, the ladder upon which he was standing, owing to a defective standard, gave way, and the young man was caught in the revolving machinery and wound around the shaft, the belt confining him to the revolving shaft until the machinery was stopped, and he was released by backing the machinery and unwinding the belt which fastened him to the shaft. His arms and legs were broken, and he sustained such internal injuries that, as the result thereof, he died in a few days. At the last term of this Court, overruling the defendant's demurrer to the plaintiff's evidence, this Court held that upon the evidence submitted, a jury would have been justified in finding that the ladder broke from the mere weight of the boy and because of the defect

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in the standard, or that the ladder was violently shaken and jostled by the sudden motion of the shaft occasioned by the defective engine, so that the boy was thrown against the belt and carried by it to the shaft. We cannot say, in view of the excellent character and industrious habits of the boy, his earning capacity as well as his expectancy of life, that a verdict for \$7,500 was excessive. Certainly not so excessive as to evince partiality, caprice, prejudice, or corruption on the part of the jury.

Affirmed.

Minnis v. Abrams.

MINNIS v. ABRAMS.

(*Knoxville.* October 8, 1900.)

1. EVIDENCE. *By surviving party in action against administrator.*

In an action against an administrator, the plaintiff is competent to prove his possession of a letter to himself from the deceased, which he offers in evidence, and that it is in the handwriting of the deceased. These facts do not constitute "transactions with" or "statements by" the deceased, that the surviving party is forbidden by the statute to testify to.

Code construed: § 5598 (S.); § 4565 (M. & V.); § 3813a (T. & S.).

Cases cited: *Montague v. Thompson*, 91 Tenn. 173; *Mason v. Spurlock*, 4 Bax., 563.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

HICKEY & PEEPLES for Minnis.

J. M. TRIMBLE for Abrams.

McALISTER, J. This bill was filed to collect balance due on a promissory note and to enforce vendor's lien for same on tract of land in Hamilton County.

The principal controversy in the case was wheth-

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er the note was barred by the statute of limitations. The note was for \$400. It was dated in 1886, and the bill was not filed until 1898. Complainant relied on a new promise made by a letter written to complainant by the maker of the note, in which he assured him the statute of limitations should never run against the debt and lien. The maker of the note died, and this bill was filed against his widow, heirs, and devisees to enforce the vendor's lien and collect the note. An administrator *ad litem* was appointed and made a party defendant to this bill. This was, therefore, a suit between the complainant and the administrator of the estate, and the statute forbidding either party to testify in respect of communications and transactions with the deceased would apply. The Court of Chancery Appeals excluded all testimony by the complainant as to communications and transactions with deceased, but held that it was competent for complainant, although a party to the case, to testify to the independent fact that he had this letter in his possession, and that it was in the handwriting of his uncle, the deceased maker of the note. The section of the code referred to is as follows, viz.: "In actions or proceedings by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transactions with or statements by the testator, intestate, or

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ward, unless called to testify thereto by the opposite party." Shannon's Code, § 5598.

The policy of the statute is to provide that when one of the parties to a litigated transaction is silenced by death the other shall be silenced by law. Wharton on Evidence, Vol. 1, sec. 466. It will be observed that the statute simply excludes proof of transaction with or statements by the deceased, but does not make the surviving party incompetent as to other matters. We do not think proof by the surviving party that he had a letter in his possession, and that the letter is in the handwriting of the deceased, is in contravention of the statute. These are independent facts, which we hold may be proven by either party to the suit. It was held by this Court in *Montague v. Thompson*, 7 Pick., 173, that preliminary to the introduction of other proof it was competent for the surviving party to state as independent facts that he at a particular time possessed a letter or written instrument, and that it had been unintentionally lost, but he was not competent to testify as to its contents. See *Mason v. Spurlock*, 4 Bax., 563.

In the present case the Court of Chancery Appeals did not hold that complainant was competent to testify as to contents of the letter, but simply that he had a letter in his possession, and that the letter was in the handwriting of the deceased. The letter then spoke for itself.

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There is nothing in the case of *Scott v. Thornton*, decided at Jackson, April term, 1900, that militates against this view. All that we held was that H. C. Scott, being a party in interest in the record, was disqualified to testify about the transaction in a suit against his deceased brother's estate. It is true the question in that case was in respect of the admissibility of a letter, but complainant was not offered as a witness to testify to the handwriting of deceased.

Affirmed.

Street Railroad v. Boddy.

STREET RAILROAD v. BODDY.

(*Knoxville*. October 8, 1900.)

STREET RAILROAD. *Duty to alighting passengers.*

A street railroad company is not held to that high degree of care and liability, which it owes to a passenger on its cars, in favor of one who has alighted from its car at his destination, a public place—*e. g.*, an intersection of streets, over which the company has no special control—and is proceeding to the sidewalk. The company does, however, owe to such person, at such public place and while near its track, a very high degree of care. At its stations or other places under the control of the company, persons do not, it seems, lose at once their character of passengers on alighting from the cars.

FROM HAMILTON.

Appeal in error from Circuit Court of Hamilton County. FLOYD ESTILL, J.

BROWN & SPURLOCK for Railroad.

BLOOM & BODDY and PRITCHARD & SIZER for Boddy.

BEARD, J. The defendant in error boarded a car of the plaintiff in error, which ran north on Whiteside street, in Chattanooga. His point of destination was the intersection of that street with Lewis street. When this place was reached the

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car was stopped, and he was invited to alight. To do this he passed to the back platform and thence down the steps. After reaching the ground, and while the car was standing still, he passed around its rear end, intending to cross, as was his habit, and as his business called him to the far side of Whiteside street. About eighteen inches or two feet from the track on which the car stood which he was leaving there ran a parallel track, used for the passage of the cars of the same company. In the act of stepping between the rails of this parallel track he was struck by a south-bound car, which was running at such a rate of speed that, after having knocked him down, it dragged him a very considerable distance before it could be brought to a standstill. The result was serious personal injuries, for which he obtained a substantial recovery in this action. Upon this appeal in error by the railway company a number of assignments of error were made upon the action of the trial Court, only one of which will be embraced in this written opinion; the others, being less important, will be disposed of orally.

The trial Judge, after properly stating to the jury if they found that plaintiff and defendant were guilty of negligence which contributed proximately to the injury, or if they found the want of care on the part of the plaintiff was the proximate cause of the action, the action must fail,

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then added: "If the proof shows that the plaintiff was a passenger on one of the defendant's cars, and he had alighted from the car upon which he had been transported, and in attempting to leave at the point of his destination, to go to his business, he was injured by another car being operated by the defendant company while attempting to cross behind the car from which he had alighted, that he would still be considered a passenger and the defendant would owe him a high or extraordinary degree of care to protect him. . . . He has the legal right to cross the track and go to his destination in safety, and the defendant was bound in the highest degree that he was exposed to no peril."

It is obvious that the situation in which the defendant was placed just before and at the moment he received this injury, while such as to require prudence on his part, at the same time imposed the duty of diligent attention upon the railway company to see that he received no injury from anything under its control. The conductor and motorman on the approaching car, seeing that the north-bound car had stopped at the crossing, were bound to know that passengers were alighting from or getting on it. If alighting, they might well have anticipated the possibility that they would come out from behind the car to cross the street, and in doing so would be put in peril by the approaching car, unless it was under

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perfect control. That the care required of the plaintiff in error was proportioned to the danger more or less incident to the situation is obvious; but did the passenger relation between the common carrier and the defendant in error exist at the moment of the injury complained of, so that the law imposed in his favor upon the railway company the extraordinary degree of care required by this instruction? ..

On this question there is a conflict of authority, but we think the more reasonable view is that where a man who has traveled on a street car steps from the car upon the street, this terminates his relation and rights as passenger, and the railway company is not responsible to him as carrier for the condition of the street, or for his safe passage from the car to the sidewalk. Where a common carrier has the exclusive control or occupation of its tracks and stations, and can arrange and manage them as it sees fit, it may be properly held that a person intending to take passage upon, or leave, a train sustains the relation of a passenger in leaving or approaching the car at a station, but "one who steps from a street railway car to the street is not upon the premises of the railway company, but upon a public place, where he has the same rights with every other occupier, and over which the company has no control. His rights are those of a traveler upon the highway, and not of a passenger."

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Creamer v. West End Street Railway Co., 156 Mass., 320 (S. C., 32 A. S. R., 456).

If the limitation indicated in the foregoing paragraph was not adopted, it would be difficult to suggest one resting upon a satisfactory basis. Take the case at bar. If the passenger relation did not determine when the defendant safely alighted from the car, when would it end? Would it continue only while he was crossing the parallel track, or until he had reached a point of comparative safety on the far side of the street? Or if, after reaching the ground, he had directed his steps to the other side of the street, would it have continued until he had reached the pavement? We think that the Massachusetts Supreme Court was wise in adopting the rule that this relation terminated the moment the passenger descended to the street. This is a fixed point, free from all speculation or uncertainty.

In accord with this will be found the cases of *Central Railway Co. v. Peacock*, 69 Md., 257 (S. C., 9 A. S. R., 425); *Busby v. Phil. Traction Co.*, 126 Pa., St., 559 (S. C., 12 A. S. R., 919); *Platt v. Forty-second St., etc., Ry. Co.*, 4 T. & C. (N. Y.), 406.

We think the trial Judge was in error in announcing a different rule, and as this error may have materially affected the jury in their consideration of the case, we are constrained to reverse and remand for a new trial.

Woodard v. Bird.

WOODARD v. BIRD.

(*Knoxville*. October 13, 1900.)

1. GUARDIAN AND WARD. *Guardian's authority to loan and invest ward's funds.*

A guardian's authority to loan and invest his ward's funds is purely statutory. The statute on this subject provides that "where the profits of a ward's estate shall be more than sufficient to educate and maintain him, the guardian shall lend the surplus, and all other sums of money in his hands, upon good and sufficient sureties, or by mortgage on real estate—the amount, however, not to exceed one-half the value of the real estate mortgaged, to be approved by the Court at its next session, and to be repaid with interest—or he may invest the same in State bonds." (*Post*, pp. 681, 682.)

Code construed: § 4280 (S.); § 3384 (M. & V.), § 2513 (T. & S.).

2. SAME. *Unauthorized investment of ward's funds, and ward's remedy.*

The transaction is wholly unauthorized and voidable at the election of the ward, who may recover back his funds invested therein from both his guardian and the other party thereto, having knowledge of the illegal use of the trust fund, where a guardian buys, with his ward's funds, a note secured by mortgage, taking indorsement of same, without recourse, to himself as guardian, and then proceeds, without submitting same to County Court for approval, to pay part of the purchase price, leaving the note in pledge for a large balance, and agreeing that, upon foreclosure of the mortgage, this balance should be first paid out of the proceeds. (*Post*, pp. 682–687, 691, 692.)

3. SAME. *Same.*

And, in such case, the ward is entitled, as against the seller of the note, who participated in the illegal transaction, and as against his assignee of the balance due on the note, who did

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not participate in the illegal transaction, but took a mere equity, inferior to that of the ward, to have the fund realized from foreclosure of the mortgage first applied to the repayment of his funds illegally diverted into the purchase of the note. (*Post*, pp. 682-687, 691, 692.)

Cases cited: *Gordon v. English*, 3 Lea, 634; *Williams v. Love*, 2 Head, 79.

4. SAME. *Same.*

And it constitutes no defense, in such case, to the innocent ward's action to recover back his funds illegally paid on the purchase of such note, that the guilty seller of the note had made the transaction as executor of an estate, and had distributed the fund received and made settlement of the estate before the bringing of the ward's action. (*Post*, pp. 684-686.)

Cases cited: *McAlister v. Montgomery*, 3 Hay., 93; *Sneed v. Hooper*, Cooke, 200; *Parker v. Gilliam*, 10 Yer., 395; *Smart v. Waterhouse*, 6 Hum., 158.

5. CROSS BILL. *Unnecessary, when.*

A cross bill is unnecessary, and the refusal of permission to file it proper, where its averments, so far as they are cognate to the case made by the original bill, are mere repetitions of the averments of the answer under which full relief could be had. (*Post*, p. 687.)

6. CHANCERY SALE. *Purchaser's rights.*

The purchaser of land under decree of foreclosure acquires no title where the case in which the sale is made is reversed in its material aspects, upon a broad and general appeal taken from the final and all other decrees granted at the same term that the sale was confirmed. (*Post*, pp. 688-690.)

Code construed: § 4922 (S.); § 3906 (M. & V.); § 3186 (T. & S.).

Cases cited: *Winchester v. Winchester*, 1 Head, 460; *Lewis v. Baker*, 1 Head, 386; *McGavock v. Bell*, 3 Cold., 513; *Livingston v. Noe*, 1 Lea, 55; *Furber v. Carter*, 2 Sneed, 1; *Dossett v. Miller*, 3 Sneed, 73; *Pond v. Trigg*, 5 Heis., 536; *Childress v. Hurt*, 2 Swan, 486.

7. SUPREME COURT. *Cannot look to the facts beyond report of Court of Chancery Appeals, when.*

Upon review of a cause appealed from the Court of Chancery Ap-

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peals, this Court cannot look behind the report and opinion of that Court for the facts of the case. (*Post*, p. 692.)

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

ROBT. P. WOODARD and PRITCHARD & SIZER
for Woodard.

R. L. BRIGHT for Bird.

M. H. CLIFT for Doescher, cross complainant.

FRAZIER & COLEMAN for Mrs. Wisdom.

COOKE, SWANEY & COOKE, for Hampton.

BEARD, J. The original bill in this cause was filed, asking for the foreclosure of a trust deed made by S. H. and Gus Bird to J. B. Frazier, trustee, in December, 1888, conveying a valuable tract to secure Lewis Shepherd in the payment of a note for \$10,666.55, executed by the Birds and due twelve months after date. It is alleged in the bill that before its maturity, and for a valuable consideration, the payee of this note had assigned it to A. J. Wisdom, executor of the estate of Lewis Owen and Julia Owen, deceased, and

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that subsequently he negotiated a sale of it to Catherine Doescher, guardian of her minor wards, Arthur, Isabel and Harry Doescher, for the purchase price of \$11,619.42, of which amount she paid at the time the sum of \$5,000, and agreed to pay the balance in the future. To secure this balance, instead of delivering the note to the then purchaser, an agreement was entered into by which it was placed in the hands of one Wiehl, who was to hold the same for the security of the transferer. This agreement is embodied in the instrument of writing executed by Wisdom at the time, and which, after formally assigning this note to Mrs. Doescher as guardian of the minors without recourse, and reciting that, after the payment by her as above stated, there remained a balance due of \$6,619.42, which was to bear interest until paid, then closes with the following recitals, viz.: "Said note is to be held by F. F. Wiehl until said balance is paid to me, or until the foreclosure of the deed of trust hereinafter named. Said note is secured by a deed of trust executed on the same date of the note by S. H. and Gus Bird to J. B. Frazier, trustee. Upon the foreclosure of said deed of trust it is agreed by said Mrs. Doescher that the balance then due on said note shall be first paid out of the proceeds of said foreclosure sale before anything is paid to said Catherine Doescher. . . . (Signed) A. J. Wisdom, *Executor*."

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The bill alleged that certain payments had been subsequently made by Mrs. Doescher either to Wisdom or to Wiehl for him, which when credited to said balance reduced the claim of Wisdom on said note to about \$4,000, and that Wisdom had assigned this balance to complainant as the guardian of his ward.

It is insisted by complainant that, out of the proceeds of the foreclosure sale he, for his wards, should be first paid the balance of his claim and interest, and that whatever remained should be applied as far as necessary to that of the Doeschers.

To this bill the two Birds, Frazier, trustee, Wiehl, Isabel, Harry and Arthur Doescher, and Mrs. Catherine Doescher, in her own right and as guardian, were made defendants. Arthur and Isabel and Harry Doescher filed a general answer to the bill. Isabel and Harry being minors, but over fourteen years of age, answered in person and by M. H. Clift, their guardian *ad litem*.

In their answer they admit the contract was made by their guardian with Wisdom to purchase this note, and that at the date of the contract there was paid to Wisdom \$5,000, and they allege that subsequently various large sums were paid by her to Wisdom on account of the contract, all of which came from their estate in the hands of their guardian. They deny the right, however, of their guardian to enter into this contract and make

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this investment, and insist that in so doing there was an abuse of her trust, in which Wisdom, her vendor, was an active participant. With their answer they file a cross bill in which, after repeating these averments of the answer, they charge that the contract made by Wisdom with their guardian was made in his own right, and not as executor; that in receiving the payments made by Mrs. Doescher on this illegal contract he had knowledge of her misappropriation, and they allege that they have a right to hold his estate (he being then dead) liable for the sums received by him, as well as for a \$2,500 note belonging to their estate, put into his hands for collection, the proceeds of which were to go to the credit of the contract, and interest upon these various amounts. They ask, among other things, therefore, that the contract of purchase of this note by their guardian be declared illegal, and that they have a decree against his estate for the sums received by him in money, as well as what he should have received on the \$2,500 note and interest. They also pray for general relief.

To this cross bill Mr. Wisdom, as executrix of A. J. Wisdom, and in her own right, made answer, in which she alleged that her testate made the contract of sale to, and received the purchase money in question from, Mrs. Doescher as executor, and not as an individual, and denied that his estate could be held liable, even if there had

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been misappropriation of the funds of the wards as charged, inasmuch as before his death he had paid out all of the funds received by him to the legatees of the estate of his testates, and had made a full and final settlement of their estates. The answer also denied that the guardian of cross complainants was without authority in law to make the instrument in this note.

An order *pro confesso* on the original bill was taken against S. H. and Gus Bird. Subsequently an application was made and granted to set aside this order as to these defendants, upon terms imposed by the Chancellor. S. H. Bird availed himself of these terms or conditions, and filed an answer. Gus Bird did not. In the answer of S. H. Bird, it is alleged that the real estate covered by the trust deed to Frazier came to himself and his brother Gus as devisees under their father's will, and at that time was involved in litigation which was subsequently compromised by an agreement on their part to pay \$2,000, which sum they borrowed from their attorney; that, beginning with this, their transactions were quite numerous, so that by December, 1885, he claimed a balance of \$10,666.55, and required them to execute the note and mortgage involved in this litigation. He enters with much detail into these various transactions, and charges that in many and various respects they were taken advantage of by him, and were induced to execute the present

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note, when in fact there was nothing due to him, or, if anything, only a trifling sum of money. They admit the transfer of this note by its payee to A. J. Wisdom, but they allege that he took it after maturity, or, if before, he was not a purchaser for value in due course of trade, and that it was subject in his hands and that of the present holder to all equitable defenses that existed while in the hands of the original payee.

It is further alleged that in 1891 respondent and his brother borrowed from Catherine Doescher \$1,700, and gave her their joint note, secured by a trust deed on this same tract of land; that thereafter the two brothers partitioned the tract between themselves, save a small part of it, which was left in common; that after the maturity and non-payment of this note the property was advertised for sale under this last-mentioned trust deed, during which time its makers were engaged in raising money to discharge it, when, by false promises made by Catherine Doescher and the attorney who had before this represented them, but who now represented her, they were induced to forbear and submit to the foreclosure; that after this was effected this agreement was repudiated, and Mrs. Doescher, the purchaser, instituted proceedings to obtain possession, pending which she negotiated a trade with Gus Bird, by which, in consideration of his conveyance to her of the portion of the property which he held under the partition, as

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well as his half interest in the undivided part of this property, she was to release him from all liability on the \$1,700 note, as well as the note for \$10,666.55 executed to Lewis Shepherd which she claimed to hold, and also to reconvey to himself and wife one hundred acres out of this property, all of which, it is alleged, was done. This transaction so carried out, it is averred, was by operation of law, a release of respondent personally, and of his interest in the land from the two notes and mortgages, and if not, that it was a fraudulent scheme designed by the parties to throw the burden of these debts and the mortgages on him and his land.

Subsequently S. H. Bird presented to the Chancellor a cross bill, and asked leave to file it in the cause. This was declined, but by a proper order it was preserved in the record. On examining it, we find that it is simply a restatement of the allegations of this answer.

On the final hearing of the cause it was decreed that Shepherd, the payee, transferred the note of \$10,666.55 to A. J. Wisdom, as executor, before maturity, for full value, and in due course of trade, and Wisdom, as executor, afterward assigned the note to Catherine Doescher as guardian of her minor children, for value, and without any taint of fraud, either actual or constructive, in the transfer; that of the purchase money the transferee had only paid a part, and that by the terms of

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this transfer the note was left in the hands of Wiehl until the balance was paid, and if not paid then for a foreclosure sale under the trust deed, out of the proceeds of which A. J. Wisdom, executor, was entitled to priority of satisfaction, as against the Doeschers; and that by his transfer to complainant Woodard, guardian, the latter succeeded to this right of priority; that complainant was entitled to a foreclosure of the trust deed described in the original bill, and to this end the Clerk and Master was ordered to first offer for sale so much of the original tract as had not been partitioned between the Birds, next the lands partitioned, save the 100 acres conveyed by Catherine Doescher to Gus Bird and wife, and then this 100 acres, provided he has not already realized enough to satisfy the decree; and then he was to offer the whole tract for sale and report his action to the Court. The cross bill of the Doeschers' was dismissed. After a number of intermediate steps, which need not be mentioned, this decree of sale was ultimately executed by a sale of the whole tract to F. T. Hampton, at the price of \$10,900, who, having paid the whole amount, asked the Court for a decree of divestiture of title out of all the parties to the suit and a vestiture in himself, which was accordingly entered. From this decree, as well as the former orders and decrees in the cause, S. H. Bird prayed and perfected his appeal, and from this decree and that dismiss-

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ing the cross bill, the Doescher children prayed and perfected an appeal.

The cause was recently heard by the Court of Chancery Appeals, and that Court having affirmed the decree of the Chancellor, it was brought before us for review of the action of that Court by all the parties to the original appeal.

This statement of the pleadings and various steps taken in this cause has been necessary in order to a proper understanding of the contentions of the appellants, and of the complaint which they make respectively of the disposition of these contentions by the decree of the Court of Chancery Appeals.

We will first dispose of the claim of the Doescher children. Their insistence is that their guardian had no right to invest their money in the purchase of the Bird note and mortgage. Is this insistence sound? By § 4280 of Shannon's Code, which corresponds with § 3354 of the Code of Milliken and Vertrees, it is provided, that "where the profits of a ward's estate shall be more than sufficient to educate and maintain him, the guardian shall lend the surplus and all other sums of money in his hands upon good and sufficient sureties, or by mortgage on real estate, the amount, however, not to exceed one-half the real actual value of the real estate mortgaged, to be approved by the Court at its next session, and to be repaid with interest, or he may invest the same

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in State bonds." The transaction in question must rest for its legality upon this section of the Code, for the authority of the guardian to invest his ward's funds is purely statutory. Even if it were conceded that a purchase of an existing mortgage was within the terms of the statute, yet this contract could not be saved. The statute contemplated that the guardian, in parting with the ward's money, should get the custody of and have the control of the note and mortgage representing the loan, and yet in this case, notwithstanding the payment of \$5,000, Mrs. Doescher never obtained possession of the securities in question; on the other hand, it was specially agreed that she should not, as long as there was a dollar of the purchase money still due. In addition, there is no pretence that it was ever submitted to or approved by the Court having jurisdiction of this guardian, an act made essential to a legal consummation. But a moment's consideration, we think, will make it clear that this transaction was not within the legislative intent. When a guardian deals directly with the borrower, he is personally familiar with the transaction from its inception to its conclusion in the payment of the money and the acceptance of the mortgage, and is thus able to know that everything has been done for the security of the ward's estate. It is otherwise when he purchases an existing mortgage. What secret vice there is in it he cannot know.

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Its consideration may be of such a character as to make it void under the law even coming to his hands before maturity for full value and without notice of the vice inherent in it. But the contract between Wisdom and this guardian cannot be supported on any ground. If it had been submitted to a Court of Equity beforehand, it would not have been authorized, and having been entered upon without prior authority, cannot be ratified. The sale was of an overdue note, and made by Wisdom without recourse. In addition, the nature of the transaction placed the funds of the minor in imminent peril. On a purchase, to complete which required an expenditure of over \$11,000, the guardian pays in cash only the sum of \$5,000, and leaving the papers in the custody of a third party, agrees that in the event of a foreclosure or otherwise, the claim for the large balance due the seller shall first be satisfied, and thus places upon her ward the risk of loss from future deterioration of the property. Such a transaction cannot be maintained on any sound principles, and its illegality affects both parties. She had no power to purchase this security, and Wisdom had no right to sell it to her. He knew he was dealing with a guardian who was thus using her ward's money in making an unlawful contract. His transfer to her was not as an individual, but in her trust capacity. By its terms he admits that he was contracting with her as a trustee,

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and about the investment of funds belonging to her. He was in its strictest sense a transferee with notice, and being so, under an equitable rule of universal application, "became himself a trustee for the original" beneficiaries. 2 Pomeroy's Eq., sec. 1048.

But it is said that, even if this be so, yet Wisdom in this was dealing for the estate of his testator, and having disposed of the moneys received among the legatees under the will, his estate cannot be held. This is a mistake. Having co-operated with the guardian in the abuse of her trust, he could not, if alive, nor can his executrix, since he is dead, shift the consequences of his participation upon the estate of which he was the representative. He had no power to involve these estates in this transaction, and had he attempted by express words to provide that he was dealing with the guardian as an executor, and not as an individual, he could not have secured himself against personal responsibility as a constructive trustee. For lacking the right to bind these estates, he was bound himself. This rule is applied in the case of a party who, claiming to be an agent, does an act for a principal without authority to bind the principal and is held bound personally (Ewell's Evans on Agency, *302, cases cited in note to article on Agency, 1 Am. & Eng. Enc. L., pp. 1124, 1125), and also in the

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case of an administrator who executes a note in his representative capacity.

There is nothing in the record to warrant the presumption that this executor had a right to invest the funds of the estates he was controlling in the note of the Birds. But conceding to him the power and the right to purchase this note for these estates, yet when acquired he had in law the unlimited right to dispose of it in any way he saw proper (*McAlister v. Montgomery*, 3 Hay., 93; *Sneed v. Hooper*, Cooke, 200), subject alone in equity to the right of parties interested to follow it into the hands of a fraudulent vendee or mere donee. *Parker v. Gilliam*, 10 Yer., 395; *Smart v. Waterhouse*, 6 Hum., 158. This unlimited legal power of alienation he exercised by selling to Mrs. Doescher, guardian, and by the terms of the transfer vested in her the title subject alone to the equitable lien he reserved to secure the balance of the purchase money.

And it is immaterial that treating the moneys thus wrongfully received from the guardian, as assets of the estates of which he was executor, A. J. Wisdom in his lifetime distributed them among the parties interested in those estates. His good faith in so doing would not have protected him, nor will it serve as a shield for his estate. This appropriation of the trust fund is no more a defense than would have been an application of it in equal good faith to the discharge of his

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personal debts. Having received it with the trust impressed upon it, he could only rid himself of liability by paying it over to the parties equitably entitled to it—that is, the Doescher children, or rather, their legal representative. There was error, therefore, in the dismissal of the cross bill of the Doescher children. On it they were entitled to a decree fixing the liability of the executrix of Wisdom, deceased, for the amount of their funds which came into his hands or into the hands of his agent, Wiehl, for him, with interest from the date or dates of the receipt of same, and also for any loss sustained by them if any, in a failure on his part to collect any security of theirs turned over to Wisdom, the proceeds of which, when collected, were to be appropriated to the credit of their guardian's purchase of the note of the Birds. They also have a superior lien on this note and the mortgage to secure it for such sum as may be found due to them, and are entitled to a decree for a foreclosure of the mortgage to reimburse the trust funds, and then over against Mrs. Wisdom, executrix of A. J. Wisdom, for any loss sustained by them on the sale. *Gordon v. English*, 3 Lea, 634-639; 1 Perry on Trusts, sec. 128. This sale, however, could not be decreed until the liability of the Wisdom estate had been ascertained upon a proper reference.

Nor can the complainant, Woodard, guardian,

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complain of this disposition of the claim under this cross bill. Certainly A. J. Wisdom, if alive, could not. As against him, this prior lien to secure the wards of Mrs. Doescher, on this note and mortgage of the Birds, given above, rests on a sound basis in reason and authority. The complainant, Woodard, guardian, stands on no better ground. Wisdom was, after his transfer, only the owner of an equity in these securities. This was what he transferred, and all he could transfer in his settlement with complainant, and the rule is, a purchaser of an equitable title must always abide by the case of the person from whom he buys. *Williams v. Love, Ex.*, 2 Head, 79.

As to the errors assigned by S. H. Bird:

1. We think the Chancellor properly refused him permission to file his cross bill. It was not necessary. As far as it is cognate to the case made by the original bill, it was but a repetition of averments of the answer, under which he could obtain all the relief to which he was entitled.

2. There was no error in the holding of the Chancellor that the transaction between Catherine Doescher and Gus Bird, whatever its nature, could not and did not affect the note and mortgage made by the Birds to Shepherd.

3. There was error in the order of sale as prescribed by the Chancellor. This, however, is now immaterial, inasmuch as we have already held that no decree for sale should have been entered

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until the liability of the Wisdom estate to the Doescher children was ascertained.

The decree of the Court of Chancery Appeals affirming the decree of the Chancellor dismissing the cross bill of the Doescher children, including Mr. and Mrs. Rhinehart, and the decree for the sale of the real estate, as well as the final decree divesting title out of the original parties interested in it and vesting in the purchaser, Hampton, are therefore reversed.

In behalf of the purchaser, Hampton, however, it is insisted that the title acquired by him ought not to be affected by this reversal, because as a stranger to the cause he bought in good faith at the Master's sale, made under a decree pronounced by a Court having jurisdiction of the subject-matter and the parties. This insistence we do not think sound, nor is it sustained by the Tennessee cases relied upon for authority. The case of *Winchester v. Winchester*, 1 Head, 460, was one where a bill of review was filed to impeach a decree of near thirty years standing under which many sales had been made, on the two grounds, of error apparent on the face of the record and of newly discovered evidence. The Court there announced the elementary rule "that whenever a Court of Chancery or other Court of general jurisdiction possesses jurisdiction of the subject-matter of litigation and has acquired jurisdiction of the parties, as to third parties, interested under its

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judgments and decrees, its proceedings cannot be held to be void after a final disposition of the cause." In *Lewis v. Baker, Id.*, 386, it was held that, under sec. 16, Chapter 20, of the Act of 1835, Code (Shannon) § 4922, where a decree had been executed by a sale of property, either real or personal before a writ of error is obtained and supersedeas granted, the title of the purchaser under the decree is not affected by the reversal of the same upon a writ of error. *McGavock v. Bell*, 3 Cold., 513, and *Livingston v. Noe*, 1 Lea, 55, were both bills to impeach former decrees and the titles of purchasers thereunder, and in each case the rule as announced in *Winchester v. Winchester, supra*, was applied.

The case at bar is not within the authority of those cases. It is one of purely equitable jurisdiction, from the various decrees in which broad appeals were prayed by the parties, whose assigned errors went to the life of those decrees. The result is, that those decrees were annulled or vacated, and the cause was brought to this Court for trial *de novo*. *Furber v. Carter*, 2 Sneed, 1; *Dossett v. Miller*, 3 Sneed, 73; *Pond v. Trigg*, 5 Heis., 536. In addition, it is well settled that the purchaser of real estate at a Master's sale in such a cause obtains no interest in it by his bid; this stands as a mere offer until the report of the sale is confirmed by the Chancellor. *Childress v. Hurt*, 2 Swan, 486. And it happens

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that in the present case the decree of confirmation amounting to an acceptance of Hampton's bid contains the prayer for and the Chancellor's grant of an appeal to these complaining parties. So that in the sense of the rule hereinbefore quoted, there was no final disposition of the cause, as to the purchaser, at the time the appeal was granted. The appeal devitalized the decree of acceptance, and left the rights of all parties to be determined as if no sale had been made, and if made, as if the report of it was not confirmed.

Whatever may be the rule in other Courts, as laid down in 2 Freeman on Judgments, sec. 454, that in our Courts is the one already indicated.

The cause is remanded to the Chancery Court for proceedings in accordance with this opinion. The costs of the appeal will be paid by P. P. Wisdom, executrix of A. J. Wisdom, deceased; the costs below will await the final determination of the case.

ON PETITION TO REHEAR.

BEARD, J. We are asked by complainant to modify the decree heretofore entered so as either "to award execution against the estate of A. J. Wisdom, deceased, for the amount paid to him by Mrs. Doescher on account of the attempted purchase by her of the Bird note, after crediting thereon so much of the proceeds of the sale of the property as may remain after payment of the balance due

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petitioner's wards, or else to adjudge, in the event the proceeds of the foreclosure sale are insufficient to pay in full the amount due on the Bird note, that then petitioner's wards and the wards of Mrs. Doescher are entitled to share in such proceeds in proportion to their respective interest in said note."

The necessary effect of the modification thus sought is to place the risk of the solvency of the estate of A. J. Wisdom, in whole in the first instance, and in part, in the second, upon the Doescher children, who are entirely innocent in this matter of breach of trust of which they complain and against which relief is granted them by our decree. We think this should not be done. In addition, in the matter of working out their equities as prescribed in the decree, we but adhered to a rule adopted by this Court in *Gordon v. English, supra*, and sustained by the authorities cited in support of the opinion in the case. We can see nothing in the record to warrant us in departing from this rule.

It is insisted in the petition that the equities of the Doeschers and of petitioner's wards are equal. We do not think so. Those of the Doeschers are certainly prior in point of time. They are also superior in right. For taking, as did their guardian, an assignment of an equity, he took it subject to all antecedent equities. In other words, he (and in this he and his wards are

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identical) stands in the place of his assignee, and must abide his title. *Williams v. Love, supra.*

We are invited to go back into the depositions in this case, to ascertain what is assumed in the petition to be Wisdom's true connection with the Bird note. Even if this could result in changing our view in this matter, yet we cannot do it. We are confined for the facts to the opinion of the Court of Chancery Appeals; upon that alone are we at liberty to rest. Re-examining, as we have done, the record so far as we are permitted to do, as well as the opinion heretofore delivered, we cannot discover any warrant for changing the conclusions therein announced. The petition is therefore dismissed.

McLean v. Lerch.

McLEAN v. LERCH.

(*Knoxville*. October 15, 1900.)

HOMESTEAD. *Right of, subject to sale for attorney fees, when.*

An attorney's lien for compensation for services rendered in the recovery and protection of the homestead right to which a widower with minor children is entitled, may be enforced by sale of that right where the lien was declared by decree in the case in which the services were rendered upon the written consent of the widower.

Constitution construed: Article XI., Section 11.

Code construed: §§ 3798, 3799, 3803 (S); §§ 2935-2939 (M. & V.); §§ 2110a, 2113b, 2114b (T. & S.).

Cases cited: *Garner v. Garner*, 1 Lea, 30; *Stanford v. Andrews*, 12 Heis , 664.

FROM HAMILTON.

Appeal from Chancery Court of Hamilton County.
T. M. McCONNELL, Ch.

J. H. McLEAN and W. G. CAULK for McLean.

M. H. CLIFT for Lerch.

WILKES, J. This is a bill to enforce an attorney's lien for his fee against the homestead of the defendant, M. Lerch, Sr. The Chancery Court granted the relief prayed and sold the homestead,

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and on appeal, the decree of the Chancellor was affirmed by the Court of Chancery Appeals.

It appears that M. Lerch, Jr., filed his bill in February, 1896, against M. Lerch, Sr., claiming that his father was indebted to him, and attaching his lands on the ground that he had already, or was about, fraudulently to convey them. Other persons, who had levied executions on the lands, were made parties to the suit. The complainant, McLean, as attorney, represented the defendant, M. Lerch, Sr., in those cases. He filed an answer and cross bill, and in the latter set up the homestead right of M. Lerch, Sr., in the lands. He in the meantime ascertained that M. Lerch, Sr., had fraudulently conveyed the land to his son, Joseph Lerch. He procured this deed to be rescinded upon the idea that while it stood in force M. Lerch could not successfully claim homestead in the land which he had thus fraudulently conveyed. Matters so progressed that under the cross bill of M. Lerch, Sr., he was allowed and decreed a homestead right in the land involved, as against the attachment, but not as against the executions, and in the same decree the Court declared a lien upon the homestead for the fee of complainant, and fixed the amount at \$100, upon a written agreement signed by the parties to that effect, and the decree recites on its face that it was done by agreement. The land was sold subject to the homestead and bid in by L. W.

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McLean. She also became the purchaser of the homestead interest which was sold in this cause before the appeal was granted. From the decree in the original case, fixing the amount of the fee and declaring a lien for it on the homestead, no appeal was taken, and the present bill was filed some one year afterwards to enforce the lien by a sale of the homestead.

It does not appear that M. Lerch, Sr., had any wife when his homestead right was declared, and the agreement was made by him to fix the amount of the fee of the complainant as attorney. It does appear from the record that he was at that time a man about sixty-six years of age, and had raised a family of eight children, all of whom but two had at that time reached their majority. There is nothing to show that he was the head of a family in any other sense than that he had these two minor children, and from the fact that a wife is nowhere alluded to in either case, we infer he had none at that time, so that the rights of his wife, if he had one, are not in any way involved in this case.

It is said with much plausibility and force that the homestead cannot be subjected to the payment of an attorney's fee incurred in either protecting or recovering it. And the constitutional and statutory provisions are cited relating to the homestead right and providing that it shall be exempt from sale under legal process for all debts or liabilities

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except public taxes legally assessed upon it or debts or liabilities contracted for its purchase or improvements. Shannon, § 3798, and *sequitur*; Constitution, sec. 11, Art. 11.

It is said in the next place that if there could be any authority for the sale of the homestead for such a debt, it would not exist in the present case. The reasoning is that the constitution and statutes give a homestead, and it is not recovered by suit, but at best is only preserved or protected; that there was really no recovery in the present case, but only a defense of the right, and in such case a lien would not exist, on the well-settled rule that in order to give an attorney a lien upon property or a fund, it must be recovered, and not merely defended, by such attorney. *Garner v. Garner*, 1 Lea, 30; *Stanford v. Andrews*, 12 Heis., 664.

In this case the land of defendant, embracing the homestead, was attached and levied upon. The attorney filed an answer and cross bill asserting his rights to homestead and rendered services which were agreed to be worth \$100. A lien was declared for that amount on the homestead thus protected, which was not appealed from, but allowed to stand. Not only so, but the attorney, in order to protect and regain the homestead, procured the fraudulent deed to M. Lerch, Jr., to be set aside, believing that while it was in force his client was estopped and precluded from setting up his

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homestead. By this deed, fraudulent though it was, the defendant had parted with his homestead, and through the efforts of the attorney it was secured and regained. We think, therefore, leaving the other questions out of view, there was a recovery of the homestead, and it is a case in which an attorney's lien could be declared and enforced against property recovered and not merely defended.

The other question presented is a new one, at least in this State. It is shown that in Georgia an attorney has a lien upon a homestead protected by his legal services. *Strobecker v. Irvine*, 76 Ga., 639; (S. C., 2 Am. State Rep., 62); *Haygood v. Damenby Co.*, 102 Ga., 24.

But this appears to be under a statute which does not exempt the homestead from seizure for judgments, executions or decrees for debts incurred in the removal of incumbrances on it, and in addition, the cases do not seem to be in accord with a somewhat earlier case of *Collins v. Swepson*, 74 Ga., 697, with which it was by the Georgia Court not deemed necessary, in settling the issues before the Court, to reconcile them. The exact language of our constitutional provision is: "The exemption shall not operate against public taxes nor debts contracted for the purchase money of such homestead or improvements thereon." With these exceptions it is declared the homestead shall be "exempt from sale under legal process." The

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language of the statute is substantially that. the homestead "shall be exempt from execution or attachments or sale under legal process," etc., and "shall be exempt from sale in any way at the instance of any creditor or creditors." Shannon, § 3798.

The exceptions are thus stated:

"The homestead shall not be exempt from sale for the payment of public taxes legally assessed upon it, or from sale for the satisfaction of any debt or liability contracted for its purchase or legally incurred for improvements made thereon. It shall be exempt from seizure in criminal as well as in civil cases, but not exempt from distress or sale for taxes or on a judgment for failure or refusal to work on public roads, or for fines and costs for voting out of the civil district or ward in which the voter lives, or for carrying deadly or concealed weapons contrary to law, or for giving away or selling intoxicating liquors on election days." Shannon, § 3799.

"The homestead upon leasehold estates shall not be exempt from execution or attachment for rent due thereon." Shannon, § 3803.

While it was the evident purpose of these constitutional and statutory provisions that a homestead should not be subjected by legal process to any of the debts and liabilities of the owner, and that it should be exempt from seizure for debts, it was not their purpose to place such restrictions

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upon the right as to prevent the owner from charging it if necessary in order to defend it or to recover it if lost or about to be lost. And yet, with the construction asked in this case, such result might not only occur, but probably would. If a man when his homestead is attached, or about to be lost or has been conveyed away wrongfully, cannot charge it with the necessary cost of its protection and recovery, it is evident that it would often be lost from inability to give it protection. Usually persons who are compelled to contest and litigate to retain or regain their homesteads have no other property, and if they cannot charge the homestead, they would have no means of defending it, and the provision would prove a hurtful burden instead of a helpful provision.

Now in this case, as we have found, the homestead was not only protected in the suit, but was also recovered through the efforts of the attorney engaged in the litigation, and as a part of his services in the case. The decree was taken, and the record shows that the amount of the fee was fixed by agreement of the parties. The decree and agreement were equivalent to the execution of a mortgage or charge upon the homestead by the owner, but without any power of sale. This being so, it cannot be that this lien, thus fixed by decree, not excepted to nor appealed from and one which still remains in force and is virtually a consent decree, cannot be enforced by a proper

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proceeding. Upon another view the lien can be sustained—the homestead was recovered for the claimant. The expense of its recovery attached to it as an incident of its recovery, and he takes it subject to the incumbrance necessary for its recovery, but especially is this so when he has virtually agreed and consented to the lien and also to the amount of the charge. We think this is not a case covered by the constitutional and legislative prohibition against sale under legal process, notwithstanding the able argument presenting a contrary view.

It is perhaps necessary to add that it is not intended by this holding to sanction a practice which has grown up of declaring a lien upon a homestead for services rendered merely in its defense and protection upon the *ex parte* application of the attorneys, oftentimes without notice to or assent by his client. We do not intimate a holding in such a case, and the present is not such a case, but one where there is a decree virtually consenting to the lien and by agreement, expressly fixing the amount of the charge, and this unexcepted to and uncomplained of for a number of years. In such case we can see no reason why the lien should not be enforced as we have before stated. The rights of a wife, if there is one, are not involved. No wife is a party to or mentioned in either proceeding.

We may, for the sake of distinction, grant that

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when there is a wife, her assent to the lien or charge must be secured, and we might go further, and hold that she must execute a conveyance as is required in other cases when the title of a married woman is involved. Whether this is true or not, we are not called upon to decide in this case, as there is no wife before the Court, and presumably none in fact. Here is the case of a head of a family of children without a wife making and agreeing to a charge upon his homestead in order to recover and protect it, and there is no reason in law why he should not do so, and sound public policy requires that he have such right.

There is no error in the result reached by the Court of Chancery Appeals, and its decree is affirmed.

Burke v. Ellis.

BURKE v. ELLIS.

(*Knoxville*. October 20, 1900.)

1. RECEIVER. *Of railroad subject to suit, when.*

Action lies in any Court having jurisdiction of the subject-matter and parties against the receiver of railroad properties appointed by the Chancery Court, in the absence of any prohibition by the Court appointing him, for any tort or default committed or incurred by him in the operation of the impounded property; but, it seems, the plaintiff, when he succeeds in obtaining judgment, must seek its satisfaction through the Court, and in the cause in which the company's properties are impounded. (*Post*, pp. 705, 706.)

2. SAME. *Same.*

The receiver of railroad properties is not exempted from suit in other Courts than that of his appointment for his torts and defaults committed and incurred in the operation of the property, by an order of the appointing Court forbidding suits elsewhere by "bondholders, creditors, and other parties interested in the properties of said railroad company and the subject-matter of this suit," and requiring them to present their claims in that cause. (*Post*, pp. 704, 705.)

3. INJUNCTION. *Operates upon parties, not upon Courts.*

Injunction operates upon parties, not upon Courts. Hence, if an enjoined party brings an action in violation of the injunction, the Court in which the action is brought may, as matter of comity, recognize the injunction, and refuse to proceed, or it may lawfully refuse to do so. The effective remedy in such case is to proceed against the offending party for contempt in the Court granting the injunction. (*Post*, p. 707.)

4. NEGLIGENCE. *What constitutes.*

It constitutes negligence *per se* on the part of a railroad company, or its receiver, to permit a child of tender (6 or 7) years to climb upon and ride on one of its cars loaded with loose dirt that was liable to slip and throw the child off at any time. (*Post*, pp. 707, 708.)

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5. INFANT. *Capacity to testify.*

Where an infant of tender (7) years has been permitted to testify without objection, exception to his testimony, for want of capacity, cannot be thereafter taken by request for instruction to the jury to disregard it. (*Post*, pp. 708, 709.)

6. DAMAGES. *Elements of.*

In an infant's action, brought by next friend for his personal injury, there can be no recovery for medical expenses incurred by the father for the infant's cure, nor for the infant's loss of time which belonged to the father. (*Post*, pp. 709, 710.)

FROM MORGAN.

Appeal in error from Circuit Court of Morgan County. S. A. RODGERS, J.

H. M. CARR and G. W. EASLEY for Burke.

SAM E. YOUNG, D. C. YOUNG, S. H. STAPLES, and J. M. DAVIS for Ellis.

WILKES, J. This is an action for damages for personal injuries against Burke, as receiver of the Harriman and N. E. R. R. Co., and against the company. There was a verdict and judgment for \$1,500 in the Court below against the receiver and a verdict for the railroad.

The receiver, Burke, has appealed and assigned errors.

The first error assigned is, that the trial Court improperly overruled Burke's plea in abatement.

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This was, in effect, that, when the accident occurred, Burke was operating the road as receiver under the appointment and orders of the Chancery Court of Roane County, and he was not liable to suit in any other Court except upon leave obtained from the Court, and, bearing upon the same feature of the case it is said it was error for the Court to refuse to charge the jury, as requested by defendant, that no recovery could be had unless it appeared that the consent and authority of that Court had been obtained to the bringing of the suit; and no such allegation having been made, and there being no such proof, recovery could not be had. After the plea in abatement was overruled the defendant pleaded that there was no authority to bring the suit, and the request was based on this plea.

It appears that Burke was appointed receiver by the Chancery Court of Roane County, and that an injunction was issued by that Court substantially as follows: "And that all such bondholders, creditors, and other parties interested in the properties of said railroad company and the subject-matter of this suit be, and they are, enjoined and inhibited from bringing separate suits in this and other Courts, but they will be required to present their claims in this cause, and for that purpose they may file herein their intervening petitions upon giving proper bonds and otherwise complying with the law, and without further leave

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or order of the Court and all claims shall be presented by a certain day or be debarred," etc.

This was, we think, only a limited injunction, and applied only to bondholders, stockholders, creditors and persons interested in the road whose claims were then in existence, and did not apply, and was not intended to apply, to the acts and torts of the receiver while operating the road after his appointment.

There is quite a conflict of holding as to whether a receiver operating a road under the orders of the State Court may be sued in another Court for his torts and defaults incurred while operating the road. There are quite a number of cases which recognize a general rule that a Court of Equity may draw to itself all controversies to which its receivers may be a party, and yet hold that it is not bound to do so, but may properly leave the determination of the question of liability of the receiver to the determination of other Courts. 2 Elliott on Railways, sec. 572.

The matter has been regulated by act of Congress passed in 1887, and amended in 1888, so far as the Federal Courts are concerned, by permitting suits to be brought for any matters arising out of the acts and transactions of the receiver in operating the property, without leave being obtained or asked. 2 Elliott on Railroads, sec. 573.

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In most States the right to bring such suit in any Court is declared by statute, but we are cited to no such statute in this State. We think, however, this is the better rule, as parties aggrieved in this way may have their rights submitted to a jury trial in their own Courts and in the usual mode, while the Court appointing the receiver and having charge of its property still has the power to direct how and in what mode payment shall be made by such receivers after the adjudication of liability is made.

We are of opinion, therefore, that these assignments are not well made, and that the suit was properly maintained in the Circuit Court so far as to test the liability of the receiver for the damages.

As to how the plaintiff in such case may proceed to obtain satisfaction of his judgment, if he recover one, is another question. It is certain that the property of corporations under the custody of one Court cannot be seized by process from another Court, and will have to be reached by proper proceeding in the Court which has the control and custody of the property and the mode and manner of its distribution.

In any event, we are of opinion that, under the limited injunction issued in this case, suits may be brought in another Court to determine the question and amount of liability, the party taking, after that is done, such further steps as

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may be required to obtain satisfaction of his ascertained and fixed demand.

But, independent of this view of the matter, inhibitions by the Court appointing a receiver are not directed against other Courts, as such, to prevent such other Court from hearing any cause brought before it in the usual manner, but are intended to operate against individual suitors and to restrain them from instituting and prosecuting such suits. In case the injunction or inhibition is unheeded, the proper remedy is to apply to the Court issuing the injunction or inhibition to stop the suitor in the different Court from proceeding with his suit, the process being one in the nature of a contempt proceeding against the individual, and the application in the Court to stay its own proceeding is ineffectual unless the Court shall feel itself bound as a matter of comity to recognize the prior and better right of the Court having charge of the receiver and property. See Gluck & Beecher on Receivers, sec. 35; Smith on Receivers, pp. 188, 192, and 195.

It is said it was error to charge, as did the trial Judge, that if the plaintiff was a child of only six or seven years of age, and was allowed by the receiver's employees to get upon and ride on a car loaded with dirt, and while so riding he fell off and was injured by the car running over him, and this was the proximate cause of the injury, the receiver would be liable. The ob-

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jection is that this charge leaves out of view all question of negligence on the part of the employees and leaves the jury to find liability, if the boy got on the car and fell and was hurt, without more.

We think there is no error in the charge. It is negligence *per se* to permit a child of such tender years to climb on and ride upon a car loaded with loose earth, that is liable to slip and throw the child off at any time. In such case the statement of the facts makes out a case of negligence, and the opinion of witnesses is not needed to show that such an act is negligence. An open car loaded with earth is such an inducement as would naturally lead children into danger, and it was negligence not to keep them away from the cars under such circumstances. There is proof tending to show that the child was not only permitted but invited to ride by the railroad employees, and with the knowledge of the superintendent.

It is said the Court should have charged the jury, upon request made, that the child, being only seven years of age, was incapacitated to testify in the case. No objection was made to the child's testifying when he appeared as a witness, and the Court was not requested to test his capacity, and, it appears, was content to let him give his statement. We must infer that the Court was satisfied, from his appearance, manner, and the

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matter of his testimony, that he was competent and intelligent enough to give his statement.

We think it is a matter for the trial Judge to pass upon whether the witness has the necessary capacity to testify, and when this is not questioned by the opposing party we may presume that the trial Judge was satisfied, from the appearance, demeanor, and manner of testifying, that the witness had sufficient capacity to give intelligent testimony. In the absence of objection made at the time, we think it was not error in the trial Judge to allow the witness to be examined at his discretion. Wharton on Evidence, sec. 391.

The trial Judge charged the jury upon the question of damages that they should fix it at such sum as would fairly compensate plaintiff for his sufferings, his loss of time, and expenses incurred in his attempt to cure himself by medical treatment and expense, and, if permanently injured, allow him such a sum as "will in your judgment compensate him for this disability."

It will be seen that the trial Judge gives the following elements as entering into the estimate of damages:

1. Sufferings.
2. Loss of time.
3. Medical expenses incurred.
4. Permanent injuries.

It is not alleged or shown that the boy incurred any expense for medical services. It is

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alleged these were incurred by the father. Such an element was not proper in estimating the damages in a case brought like this by next friend for the minor, and while there is no proof that the child paid any expenses for medical treatment, there is a statement that such expenses were incurred and paid by the father, and the charge was calculated to lead the jury to believe or infer that these expenses incurred and paid by the father might be taken into the estimate in fixing the damages. This was error.

As to loss of time: The services of a minor belong to the father, and in a legal sense there can be no loss of time to the minor. This suit is brought for the minor and to recover in his right. Whether the jury, in finding a round amount of damages, gave any part of it for medical attention and loss of time we cannot know, but they were warranted by the charge in doing so. This was error.

For these errors the judgment of the Court below must be reversed and the cause remanded for a new trial. The appellee, next friend, will pay cost of appeal.

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(*Knoxville*. November 10, 1900.)

1. **MANDAMUS.** *Granted by this Court to control action of Circuit Judge, when.*

This Court has jurisdiction, by mandamus, to compel a Circuit Judge to vacate his illegal and arbitrary action, taken out of term time, in having a judgment entered as if during term, and appeal granted as of date after close of term, and to compel him to reinstate the case on his docket for such further proceedings as might be desired and appropriate, when such relief is invoked by a party who seeks, but, by the Judge's unwarranted action, is denied any effective review of the case on appeal or writ of error. (*Post*, pp. 713-716, 721-728.)

Constitution construed: Article VI., Section 2.

Cases cited: *Miller v. Koger*, 9 Hum., 236; *State v. Hall*, 3 Cold., 255; *State v. Elmore*, 6 Cold., 528; *Whitfield v. Greer*, 3 Bax., 78; *Newman v. Justices*, 1 Heis., 787; *State v. Hall*, 6 Bax., 7; *Alexander v. State*, 14 Lea, 88; *Vanvabry v. Staten*, 88 Tenn., 334.

2. **SAME.** *Other remedy does not defeat jurisdiction of this Court.*

The existence of other adequate remedies at law, or in equity, does not defeat or affect the jurisdiction of this Court to issue mandamus to control the action of inferior Courts and Judges in aid of its appellate jurisdiction and as a necessary incident to its effective exercise. (*Post*, pp. 728-733.)

Constitution construed: Article VI., Section 2.

Code construed: § 377, (S.); § 344 (M. & V.).

Cases cited and approved: *King v. Hampton*, 3 Hay., 59; *Miller v. Conlee*, 5 Sneed, 434; *Miller v. Koger*, 9 Hum., 236; *Ward v. Thomas*, 2 Cold., 565; *Memphis v. Halsey*, 12 Heis., 210; *State v. Hull*, 3 Cold., 255; *Ing v. Davey*, 2 Lea, 276; *Vanvabry v. Staten*, 88 Tenn., 340; *State v. Hall*, 6 Bax., 7; *State v. Elmore*, 6 Cold., 529.

Cited and distinguished: *State v. Commissiones*, 1 Shan. Cases, 490; *Whites Creek Co. v. Marshall*, 2 Bax., 124.

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3. SAME. Judge taxed with costs.

Where, in a proceeding by mandamus against a Judge of an inferior Court, it appears that his action has been wholly unwarranted and arbitrary, as in this case, and manifests a partisan spirit on his part, he will be taxed with all the costs of the proceeding. (*Post*, p. 735.)

Cases cited: *State v. Puckett*, 7 Lea, 709; *Hawkins v. Kercheval*, 10 Lea, 535; *Ingersoll v. Howard*, 1 Heis., 247.

4. NEW TRIAL. Motion for, not essential, when.

Motion for new trial is not essential when a case is tried by the Judge without the intervention of a jury. (*Post*, pp. 715-743.)

FROM KNOX.

Application for mandamus.

J. C. J. WILLIAMS and WEBB & McCLUNG for
Relator.

JOUROLMON, WELCKER & HUDSON and WALTER
S. ROBERTS for Sneed.

WILKES, J. Upon a former day of the present term of this Court an application for mandamus was disposed of, and a written memorandum was handed down showing the grounds of the Court's action. This memorandum is in the words and figures following:

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“State, *ex rel.* John Richards, } Law Docket Knox
 ^{v.} }
 Jos. W. Sneed. } County.

“This is an application for mandamus against the Hon. Jos. W. Sneed, Judge of the Circuit Court in and for Knox County.

“Its prayer is to require him to expunge from the minutes of the Court over which he presides an entry of judgment for \$65 and costs in the cause of *Horn v. Richards*, and if the whole of it cannot properly be expunged, that certain parts of it be expunged so as to show that a new trial was asked for and refused; that an appeal was prayed and granted, to the end that the judgment complained of may be reviewed by this Court.

“The trial Judge answered the alternative writ and set out fully the facts in regard to the judgment as he understood them. While there are some variances between the statements in the petition and the answer to this writ, we think they are not material to the merits of the controversy. We state the facts of the case mainly as given by the learned trial Judge. It appears that he heard the case of *Horn v. Richards* without a jury, and announced an opinion that the defendant, Richards, was indebted to Horn \$65. No judgment was entered on the minutes. Counsel for Richards thereupon brought the matter before the Court, as he says, upon a motion for a new

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trial, and read a statute bearing upon the case. The learned trial Judge states that he did not understand that the application made, or matter presented, was a formal motion for a new trial, but was an effort upon the part of counsel to have the Court change his ruling and render a different judgment. However this may be, and we do not think it is material which is correct, the trial Judge directed the Clerk not to enter the judgment. This was not done publicly, but privately. Counsel for defendant ascertained that the entry was held up by order of the Judge, and made no other effort after applying to the clerk and getting this information. No further action was taken until Monday, September 3, when an appeal was prayed and granted and time given to prepare the bill of exceptions until the 8th of September, and an entry to that effect was made. The bill of exceptions was prepared and agreed to by counsel, and after being changed and interlined was filed by the trial Judge on September 7.

“It appears, however, that the term of the Court in Knox County closed on the 1st of September, and on the 3d, when the entries were made of the judgment and other facts, the Court was by law open in Sevierville, and could not be open in Knoxville. The learned trial Judge thereupon, believing that he could not do any legal and valid business after the time for the adjournment

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of the Court, caused an entry to be made giving a judgment *nunc pro tunc* for the \$65 and cost, as of date September 1, when the cause was heard by him, but reciting that the prayer for an appeal was not made and granted until September 3, and the extension of time to file a bill of exceptions to the 8th was then made. This left the record in shape, showing that a judgment was entered September 1, when Court was in session, but no appeal was granted or time given to file the bill of exceptions until September 3, when the Court was not and could not be in session.

“Now, the motion for a new trial was not material, as the case was heard by the trial Judge without a jury, and in such cases motion for new trial is not indispensable. Nor was the defendant seriously prejudiced by failing to have his appeal granted, as he could bring up the case, as he has done, by writ of error. But the trouble is that in the present shape of the record defendant has no bill of exceptions which the Court can regard on the hearing of his writ of error. Without intimating where the fault for this state of affairs lies, or, indeed, that any one is to blame, it is evident that the defendant has been deprived of his right to have the decision of the lower Court reviewed in such manner as to present the merits of his controversy. The action of the trial Court, whether we consider the effort

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as a consideration of a motion for a new trial or simply as a withholding of the final decision, or taking the case under advisement, led the defendant's counsel to delay his appeal until he could not legally make it, and we are of opinion that all the action of the Court on the 3d of September was void and of no effect, and the entry ordered on that day to be made as of date September 1 was unauthorized and of no effect, and should be stricken out. This being done, the case stands as though no judgment had ever been rendered in the cause.

"It is immaterial whether the trial Judge authorized an entry showing the Court opened on the 3d of September, or that this entry was made by the clerk of his own motion. The fact appears from the record and the answer of the Judge that the entry was ordered to be made after the Court adjourned and to be dated back to a date when it was in session, and this, we think, was a void action on the part of the trial Judge, and could not be permitted to prejudice the defendant in his effort to have his case reviewed.

"The Court directs, therefore, that the judgment, with its recitals which were ordered to be made on the 3d of September and dated as of the 1st of September, be set aside and for nothing held in the Court below, and proper order to that effect will be entered while that Court is in

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session. The case will then be reinstated and stand upon the docket of that Court as though no such judgment had ever been entered, and for such further disposition as is proper.

“The writ of error in the case of *Richards v. Horn* will be dismissed at the cost of Richards and his surety, inasmuch as there has been no valid final judgment in the case to be reviewed, because of the confused state of the record.

“The cost of the mandamus proceeding will be paid by the defendant to that proceeding. WILKES, J.”

The defendant, Jos. W. Sneed, has now filed a petition to rehear, which has been answered by the counsel for the relator, and the case is before us for reconsideration on this petition and answer.

The defendant states that he filed no brief on the original hearing, because he did not deem one necessary, and he did not realize that he could have any interest, personal or pecuniary, in the decree to be rendered in the cause; that he was busily engaged in holding his Court, and had no time to investigate any authorities bearing on the questions at issue. He continues:

“Since this honorable Court has rendered a decree against your petitioner for costs, not only affecting your petitioner as a judicial officer of the State, but all Judges alike, petitioner feels constrained to present the views that he does why said decree should be reviewed by this honorable

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Court. Further, petitioner states that in all his researches, or those of his associate counsel, he has been unable to find any adjudication by any Court taxing a judicial officer with costs."

Continuing, he says in substance that the course pursued by this Court is without authority and contrary to public policy, and should receive the most careful consideration of the Court; that if a Judge is brought before a revising Court to stand on no higher plane than an ordinary litigant, the consequences are so apparent and the lowering of the judicial standard so great that, if the suggestion itself is not sufficient to entitle petitioner to a rehearing on that point alone, it would be unnecessary to present any elaborate arguments on this question.

The petitioner thereupon proceeds to submit some propositions of law which he considers conclusive of the case, and supports the same by elaborate briefs and argument. It will be impossible in a reasonable space to give his presentation verbatim, covering as it does some seventeen pages of typewritten matter. The petitioner has, however, summarized his position in his own language as follows:

"1. We insist that, on principle and especially in view of the particular facts of this case, no action of the lower Court having been invoked, that in taking jurisdiction of this case by man-

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damus this honorable Court has exercised original, and not appellate, jurisdiction.

"2. That the writ of mandamus in this case should not issue, even though the relator has no right to appeal or writ of error.

"3. That relator has other Courts and other remedies, which is by all authorities, and particularly our own, admitted to be a conclusive answer when this Court is applied to for a writ.

"4. That your Honors are attempting the exercise of judicial discretion which is the province of the Circuit Judge in the first instance.

"5. Your Honors are demanding of the Circuit Judge to do an illegal act—to assume jurisdiction when he has none in setting aside orders made at a previous term.

"6. Your Honors have allowed the relator's attorney, in his conference with the clerk, to override and annul the solemn action of the Circuit Judge, when said Judge had no knowledge he was being influenced thereby, nor had the information set forth in the petition, and which it was his duty to make known to the Court and ask for its action in term time."

The petition and argument proceeds to set out the provisions of Article 6, Section 2, of the Constitution, defining the jurisdiction of the Supreme Court, and presents the question to the Court whether this Court, in awarding a peremp-

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tory mandamus in this case, was exercising appellate or original jurisdiction.

The case presented, in the view of petitioner, is that this Court has ordered the vacating of a final judgment in the Court below in the case of *Horn v. Richards*, when that judgment was made by him as Judge of the Circuit Court of Knox County, and was, as he thought, warranted by law. It is objected that the judgment rendered on the first hearing in this Court is not in pursuance of the prayer of the petition for mandamus, and that no application to set aside the judgment complained of was first made in the trial Court, and hence this Court was exercising original jurisdiction.

Upon this double feature of the case it is only necessary to refer to the opinion of the Court handed down on a former day. In that opinion it was correctly stated that the prayer of the petition was that the trial Judge be required to expunge from the minutes of the Court over which he presides an entry of final judgment in the case of *Horn v. Richards*, and if the whole of it cannot be expunged, that certain parts of it be expunged so as to show that a new trial was asked for and refused; that an appeal was prayed and granted, to the end that the judgment complained of might be reviewed by this Court. The relief granted upon the petition is that the judgment complained of, with its recitals which

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were made on the 3d of September and dated September 1, be set aside and for nothing held in the Court below, and proper order to that effect will be entered while that Court is in session. The case will then be reinstated and stand upon the docket of that Court as though no such judgment had been entered, and for such further disposition as is proper. This is substantially granting the relief prayed for, and the difference consists in a mere substitution of words.

It is said the specific motion to set aside this final judgment was never made in the Court below, but for the first time in this Court; and this is true, but inasmuch as the so-called final judgment was not entered until after the trial Court had adjourned, when no valid order could be made or action taken by that Court, it is plain the relator, Richards, had no opportunity to make such motion. The applications that he did make for appeal, and to have his bill of exceptions properly made part of the record, were refused upon the ground that the Court had adjourned for the term and the trial Court could make no valid order after the adjournment of Court.

But, coming to the question of merit, it is insisted that the Court, in entertaining this application for mandamus and granting relief, was exercising original, and not appellate, jurisdiction. It is proper to note that this point was not

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raised in the elaborate answer which the defendant made to the writ of mandamus on the original hearing. That answer and amended answer, with the affidavits in support of it, covered some eighteen pages, and presented the position of the trial Judge very fully.

It is said that the proceeding by mandamus is an original process, and in support of this proposition the Court is referred to High on Extraordinary Legal Remedies, 3d Edition, Sec. 27. That section, as quoted in the petition, no doubt correctly, is in these words:

“The granting of the writ of mandamus is the exercise of an original, and not of an appellate, jurisdiction, the writ itself being an original process. Hence it follows that in those States where the Courts of last resort are devoid of original jurisdiction, and vested with only appellate powers, such Court cannot exercise jurisdiction by mandamus. An exception, however, is recognized when the issuing of the writ is necessary in aid of the appellate powers of such Courts, and in such cases it is not regarded as an original proceeding, but as one instituted in aid of the appellate jurisdiction possessed by the Court.”

The petitioner states that this Court has directed that petitioner shall proceed and retry and redocket this case, and it was not competent for this Court to direct the lower Court to proceed to a hearing, because that would have been the

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exercising of original, and not appellate, jurisdiction (citing High on Ex. Leg. Rem., Sec. 253). But the petitioner inadvertently misreads the order of this Court. It did not direct that Court to retry the case, but that it should be reinstated and stand upon the docket of that Court as though the void entry had never been made, and for such further disposition as is proper. This Court declined to direct the learned Judge to retry the case or to suggest to him how he should proceed or what further steps he should take.

Mr. High in his work says (Sec. 253): "It (the Supreme Court) may, however, in aid of its appellate jurisdiction, and as a necessary incident to its exercise, issue a mandamus commanding an inferior Court to sign and seal a bill of exceptions in order that the record of the cause of which the Appellate Court has jurisdiction by appeal may be completed, the purpose of the writ in such case being merely to perfect the right of the party appealing."

To the same effect see *Miller v. Koger*, 9 Hum., 236; *State v. Hull*, 3 Cold., 255; *State v. Elmore*, 6 Cold., 255; *Whitfield v. Greer*, 3 Bax., 78; *Newman v. Justices Scott County*, 1 Heis., 787; *State v. Hall*, 6 Bax., 7; *Alexander v. State*, 14 Lea, 88; *Vanrabry v. Staten*, 88 Tenn., 334; *Ex parte Jordan*, 94 U. S., 248;

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Pettigrew v. Washington Co., 43 Ark., 33; *People v. Canal Appraisers*, 73 N. Y., 443.

See, on the general subject of mandamus, *Dane v. Derby*, 89 Am. Dec., 728, 730, 739, 742.

The petition states that this Court has directed the Circuit Court to take jurisdiction and reinstate a case on the docket that has been finally disposed of by that Court as it believed was right. We do not so understand the ruling of this Court, but it proceeded upon the idea that the so-called entry of final judgment, while valid in form, was in reality void because there was no authority or jurisdiction to enter it after the term had expired, and hence the case was still in that Court, and remained there for such disposition as the trial Judge might see proper to make of it. The direction to redocket was not to bring back a case which had been disposed of, but to continue a case on the docket which had not been disposed of, but was still pending. The entry upon the minutes being made after Court adjourned occupies the status of an unauthorized entry made by any third person not connected with the Court, and can have no other effect. It is said in the petition that this Court has said, in effect, that the relator was deprived of any appeal and that he was not entitled to prosecute a writ of error, and the same has been dismissed. It would be more accurate to say that the holding of this Court is that, by the unau-

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thorized action taken, the defendant, Richards, was prevented from so prosecuting any appeal or writ of error as to have this Court pass upon the merits of the controversy, and the writ of mandamus is issued in order that this impediment to the relator's right of appeal may be removed and in aid of its appellate jurisdiction. It is true, as petitioner states, that this Court cannot by mandamus seek to correct errors of judgment of subordinate tribunals when acting within their jurisdiction, even though the decision may bear harshly upon a relator. It will not be used to perform the office of an appeal or writ of error to review the judicial action of an inferior Court. But this by no means goes to the extent of saying that it may not be used when the right of appeal is cut off by the unauthorized entry of a final judgment when the trial Judge had no jurisdiction or power to order such entry or to allow it upon the minutes of his Court. When such void decree or judgment stands in the way of a suitor and prevents him from having his case reviewed in an Appellate Court upon its merits, this Court has the jurisdiction to direct that the void entry shall be annulled and set aside, and that proper entries to that effect be made upon the minutes of the trial Court; otherwise the void judgment would stand as having the sanction of a judicial act, which it has not and never had.

Nor is this an attempt to exercise a control

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over the discretion of the trial Judge. The learned trial Judge, in the opinion of this Court, had no discretion, nor even jurisdiction or power to order this entry on his minutes after his Court had adjourned. It was not a matter of discretion in any view of the case. It was the absence of power, the want of jurisdiction, the doing of a void act, which this Court was dealing with. Neither was this Court, in granting the mandamus, exercising the function of reviewing the merits of the controversy. It made no adjudication of the merits; it made no reference to them. Its order was alone directed to having an entry which was void, though apparently regular, and which should never have been entered upon the minutes of the Court, canceled, so that the case could be finally disposed of in such manner as to preserve the defendant's right to have it reviewed.

The case resolves itself on its final analysis into this, that the disposition of the case made by Jos. W. Sneed was made by him as an individual out of Court, and was extra judicial, and the action taken by him and the entry made upon the minutes at his direction had no more force and validity than if it had been made by a third person not connected with the Court. The relator could not have an appeal or other process of review from such an entry of judgment. In the exercise of its appellate jurisdiction,

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this Court can compel the trial Judge, while acting as a Judge, to proceed in a judicial manner to expunge from the minutes this unauthorized entry, so that when the case is finally disposed of in the Court below it may be done at such time and in such manner that either party may have an appropriate remedy by review. This extra judicial entry stands in the way of exercising the appellate jurisdiction of this Court, and it will be removed as an obstruction to the proper exercise of that jurisdiction. There is in the order of this Court no particular direction to pronounce a particular judgment, and nothing that in any way interferes with the function or discretion of the trial Judge while acting judicially, but it simply removes from the minutes his action as an individual, as though it had never occurred, leaving the case to be proceeded with in the Court below as though the void judgment had never been entered.

It is said that this Court has no power to direct that this judgment be canceled and set aside at a term subsequent to that at which it was rendered. But this argument is not sound, and, in addition, presupposes that the entry of judgment is upon the minutes by authority, while the holding of this Court is that there was no warrant for such entry whatever, and the minutes should stand as though no such entry had ever been made or had been made by some third per-

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son. It is not the case of a valid final judgment rendered judicially, but an entry made by the petitioner as an individual, and not as Judge.

It is insisted that a proceeding by mandamus will not be allowed when there is some other adequate and specific remedy for the party. What is meant by an adequate and specific remedy is not so clear, but the weight of authority is that it must be a complete legal remedy that will afford the relief to which the party is entitled.

This is the holding of this Court in *State v. Commissioners*, 1 Shannon's Cases, 490, and in *White's Creek Co. v. Marshall*, 2 Bax., 124. It is the statement of the author in *High on Extraordinary Legal Remedies*, Secs. 15, 16, 17, 18, 19, and many other sections. And the existence of possible equitable remedies does not affect the jurisdiction of Courts of law (Sec. 20), and the Courts have held that by a legal remedy such as will bar relief by mandamus is meant a remedy at law, as distinguished from a remedy in equity, and that the mere existence of an equitable remedy is not of itself a conclusive objection to the exercise of the jurisdiction, although it may, and should, influence the Court in the exercise of its discretion in the particular case. *High on Extraordinary Legal Remedies*, sec. 20; *People v. Mayor of New York*, 10 Wend., 395; Vol. 13 Enc. of Pl. & Pr., p. 498; *Commonwealth v. Commissioners of Alleghany*, 32 Pa. St.,

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218; *Ely v. Red Bank School District*, 87 Cal., 167.

The principle involved is that, whenever a legal right exists the party is entitled to a legal remedy, and when there is no other legal remedy, mandamus will lie. *People v. Mayor of New York*, 10 Wend., 395.

The party who has a plain legal right, and none other, is entitled to the writ, and is also entitled to a legal remedy, and cannot be required to abandon the legal forum in which his rights are being adjudicated and seek for relief from a Court of Equity. If a final judgment deprives him of a plain legal right, and he cannot correct it by appeal or writ of error or some other appropriate mode of review because of some improper act of the Court below, he is entitled to have the impediment removed by a writ of mandamus. It will not be refused because the party may have a remedy by action for damages. 14 Am. & Eng. Enc. Law, 97, and cases cited. Nor that the judgment may be enjoined. *Idem*, p. 102; High on Extraordinary Legal Remedies, sec. 17. If a judgment has been erroneously entered, mandamus will lie to change the record entry. 14 Am. & Eng. Enc. Law, 112c. Or to compel the inferior Court to change its docket entries to conform to the law and facts. *Idem.*, p. 116h. Or to compel the grant of an appeal. *Idem.*, p. 120-3.

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What effect would an injunction have? The relator as to this matter has no contest with his antagonist, Horn. It is wholly with the trial Judge, and his complaint is not against the Judge for his judicial action, but for action that is extra judicial and that of an individual, but which has the form and semblance of a valid entry, and is attempted to be executed and enforced as a judicial act. It is clear that a Court of Chancery could not expunge from the minutes of the Circuit Court any entry upon it, and yet the relator is clearly entitled to have this done. Suppose an injunction was brought and the judgment declared void, so that it could not be executed, and Horn should thereupon appear in the Circuit Court and demand another trial. The Circuit Judge could reply that the case had been settled by a former judgment, that his record so showed, and that a co-ordinate Court could not wipe out entries upon his record. If Horn should dismiss his suit and bring another he would be met by the same difficulty and obstacle. It is not like the case of *Woodin v. Daniel*, 16 Lea, 156, because in that case the Supreme Court never had jurisdiction of the cause or parties, and the decree of the Chancellor holding the judgment of the Supreme Court void settled the entire matter; but in the case at bar, the Circuit Court had and still has jurisdiction of the cause and parties and has the power, jurisdiction, and right

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to proceed to judgment as if the entry had never been made. The relator had a right to have a judgment judicially rendered in the Court below and to have it reviewed in the Appellate Court, and to have his rights determined and an end of litigation in the suit then pending, and he cannot be required to seek relief in a Chancery Court of equal power with the Circuit Court, and which at best could give but partial relief and with a probability, if not a certainty, of conflict of authority. The Court of Chancery could not vacate or expunge the void entry on the Circuit Court minutes, and at most could only enjoin the execution and declare the judgment void. In expunging the entry from the minutes of the Circuit Court, we do not mean the mutilation of the record of that Court, but the entry of such orders as will show the previous entry to be void and of no effect.

Petitioner says in his reply brief "that, whatever may be the authorities elsewhere, our own authority, the case of *White's Creek Turnpike Co. v. Marshall*, 2 Bax., 104, denies the right to issue the writ of mandamus when there is any Court or any remedy available to the relator, which of course, he says, includes a Court of Equity as well as a Court of Law. A more careful reading of the case by petitioner would have shown him that this language in so many words is not used in the opinion in that case,

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but words in substance the same are used on page 121, but it is not used in stating when a mandamus will be granted, but when a resort to a Court of Equity may be had. See p. 121, bottom of page. And a little further examination would have shown him that the learned Judge in the opinion, in speaking of when mandamus will be granted, says: "Neither will the writ be granted if the relator has any other adequate legal remedy" which is in accord with all the authorities we have cited and expressly excludes the idea of petitioner of any remedy in any Court.

In addition, petitioner, on a re-examination of that case, will find while the Court discusses the subject of mandamus it puts its decision on entirely different grounds. See syllabus, p. 105, sec. 7. The question involved in that case was, not whether mandamus would lie, but whether the suit could be maintained in chancery, and one of the reasons given why it would lie was because mandamus would not. But all of this discussion in regard to other remedies is wholly inapplicable to this case and to the grant of mandamus by this Court.

These authorities apply to inferior Courts when called upon to issue mandamus, and the rule in these Courts is not to issue mandamus when there is any other adequate legal remedy. But this Court, in aid of its appellate jurisdiction, has used the remedy of mandamus from its founda-

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tion. Indeed, it and the writ of error, certiorari, and supersedeas are possibly the only remedies this Court does or can use in aid of its appellate jurisdiction, and in aid of that appellate jurisdiction it has the power to grant the writ without regard to other remedies. Upon a suggestion of a diminution of a record, this Court every day orders the Clerk below to send up a perfect transcript, and this, while called a certiorari, is but one form of a mandamus to a ministerial officer in aid of its appellate jurisdiction. So, likewise, when a judicial officer does an act which he has no power to do, or refuses to do an act which the law requires him to do, and the right of the litigant to an appeal or review is cut off or embarrassed thereby, this Court can and always does remove the impediment by setting aside the unauthorized illegal act of the trial Judge or by compelling him to do that which the law requires him to do.

The authorities are so numerous that it would be useless to cite them all, and we only cite Constitution, Art. 6, sec. 2; Shannon, sec. 1396; Shannon, sec. 377; *King v. Hampton*, 3 Hay., 59; *Miller v. Conlee*, 5 Sneed, 434; *Miller v. Koger*, 9 Hum., 236; *Ward v. Thomas*, 2 Cold., 565; *Memphis v. Halsey*, 12 Heis., 210; *State v. Hall*, 3 Cold., 255; *Inge v. Davey*, 2 Lea, 276; *VanVabry v. Staten*, 4 Pick., 340; *State v. Hall*, 6 Bax., 7; *State v. Elmore*, 6 Cold., 529.

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The petition and argument complain that the attorney of the relator obtained information from the Clerk that the trial Judge had ordered the entry of judgment in *Horn v. Richards* to be withheld from the minutes, and the insistence is that the clerk is a mere ministerial officer, and the counsel had no right to resort to him for information or to be influenced by it in his actions, but that the counsel should have obtained all his information in open Court. It will be noted that the direction of the Court to withhold the entry given by the trial Judge was not given in open Court, but privately to the clerk. The clerk is the keeper of the minutes. He it is who makes the entries of judgments upon the minutes, and we can see no impropriety in counsel applying to the clerk to know if the entry in his case had been made, to the end that he might pray an appeal or take such further steps as might be necessary, and when told by the clerk that the trial Judge had ordered the entry to be withheld, it was not improper, but the exercise of proper respect to the trial Judge, to await his convenience to remove the injunction from the clerk and allow the entry to be made. Counsel would have been considered importunate in pressing the Judge to have an entry made when for any reason he deemed it proper to be temporarily withheld. We can see no bad faith in counsel in this feature of the case, and no rea-

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son why he or his client should be taxed with costs or be made to suffer any prejudice in the matter. So long as the entry was withheld on the order of the trial Judge, the defendant, Richards, or his counsel in that case could not pray an appeal or take any steps, and before the trial Judge had removed the injunction which he had privately laid on the clerk, and permitted the entry to be made, the Court had adjourned, when no valid entry could be ordered or made, and no opportunity could be had for appeal or other adequate proceeding to review.

The petitioner says that in all his reasearches and those of his associate counsel he has been unable to find any adjudication of any Court taxing a judicial officer with cost.

We have had but limited time and opportunity to examine the question, but we have with the means at hand been able to find the following cases holding that rule in other States: *Ballou v. Smith*, 31 N. H., 413; *Minich v. Rascum*, 12 P. Co. Rep., 508; *Kelly v. Simpson*, 79 Mich., 392; *Evans v. Thomas*, 32 Kans., 489; *Burgtorp v. Bentley*, 27 Ore., 268.

We find a number of cases in Connecticut, Utah, and Washington holding a different view. The Courts of New York and Michigan appear to vacillate with the general rule, not so much against the right as against the propriety and practice.

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Petitioner has cited us to the case of *The Judges v. The People*, 18 Wend., 79, in which the right to tax the costs and assess a fine against the Judge was conceded to be given by statute in case the relator was successful, and this was referred to as a reason why the discretion of an inferior Court should not be interfered with. No one contends that the discretion of an inferior Judge in a judicial matter can be interfered with, nor can he be required to render any particular adjudication or render any specified judgment.

Upon the question of costs in mandamus proceedings the petitioner might have cited another case in the same volume, *People v. N. Y. C. P.*, 18 Wend., 434, in which the Court held that costs would be awarded against the Judge upon the idea that he would be presumed to be indemnified by the party in interest; and a little further examination would have disclosed that in *Hecox v. Ellis*, 19 Wend., 157, the case in 18 Wend., 534, was criticized as adopting a bad policy. So the petitioner might have found in *People v. Littlejohn*, 11 Mich., 60, the Court held that it was not proper to tax judicial officers with costs in mandamus proceedings, but in *Kelly v. Simpson*, 79 Mich., 392, the contrary was held. The real difference in the cases rests upon the question whether the Judge was acting judicially but improperly, or was improperly re-

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fusing to act judicially, or whether he was acting extra judicially and as an individual, or when the Judge had become a partisan in the controversy. In the former case costs are not taxed against him; in the latter cases they are.

But the case of *People v. N. Y. C. P.*, 18 Wend., 534, is so directly in point in this case, that we feel constrained to state the facts and ruling in that case more fully just at this point.

In that case, the Court of Common Pleas gave judgment for the plaintiff and at the same time allowed him to amend his declaration so as to cure a fatal defect, but refused to allow the defendant to plead to the amended declaration, and a mandamus was awarded directing the Judge of the Court of Common Pleas either to vacate so much of his order as gave the plaintiff leave to amend or so much thereof as refused to allow the defendant to plead. It will be noticed that the mandamus in that case issued to correct a judicial proceeding, while the present is to correct an individual proceeding. The Court held that the plaintiff could not be allowed to amend, and the defendant refused permission to plead, because he was thereby being deprived of his right of review in an appellate Court, a result exactly the same as in this case.

But we are not without authority in our own State upon the matter of costs. The case of the *State v. Puckett*, 7 Lea, 709, was a mandamus

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against a County Judge who undertook to revise a bill of costs which had been properly adjudged against the county, taxed, examined, and certified according to law. It was held by this Court that his action was unauthorized and void, and the Court awarded the mandamus and said as to costs: "The Court might charge the defendant individually with the cost for the violation of his duty (but his term of office had expired), and inasmuch as there can be no doubt of the good faith of the Judge, and that he was contesting the relator's right for the benefit of the county, the county was taxed with the cost. The County Judge, during the pendency of the proceeding, had gone out of office, and this was treated as an important feature in the case.

The case of *Hawkins v. Kercheval et al.*, 10 Lea, 525, was a mandamus against the Mayor and Police Commissioners of the city of Nashville. The Court held that they were a quasi judicial tribunal, whose functions and duties in the first instance could not be performed by another. They had improperly removed a policeman because he sued the city. The Court issued a mandamus to the Board and taxed it with the costs, and held also that injunction was not the proper remedy, as it was not as effectual as a mandamus proceeding, and the proceeding was treated as a mandamus, although it was filed as an injunction bill.

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The case of *Ingersoll v. Howard*, reported in 1 Heis., 247, was a mandamus proceeding against the Judge of the first Judicial Criminal District of Tennessee, the Hon. A. W. Howard, upon a state of facts which presents questions somewhat similar in principle to this case. In that case the trial Judge, A. W. Howard, ordered the clerk to destroy the old roll of attorneys authorized and admitted to practice in his Court, and make a new one, and to enter the name of no attorney thereon who had not complied with the rule of the Court, made in pursuance of the Act of September 10, 1868, the substance of which was that no attorney who had belonged to the Kuklux Klan should be permitted to practice in the Courts of this State.

In obedience to the order of the Court several names of attorneys were stricken from the roll, and among the rest that of H. H. Ingersoll, who had been admitted and had been practicing for six months previous in that Court. Mr. Ingersoll stated to the Court, in open Court, that he was not obnoxious to the provision of the Act, that he was opposed to the Kuklux Klan and all other secret political organizations in Tennessee and the United States, and he asked the privilege of being heard upon the rule in behalf of himself and his brother attorneys. This was refused by the learned Judge. Mr. Ingersoll then stated that there was a wide difference of opinion among the

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Judges of the State as to the proper construction of the Act, and he desired to obtain the opinion of the Supreme Court upon it, and asked to have an entry made of record that he might be allowed to practice without taking the oath required by the order, and that the presiding Judge would pass upon his motion, so that if adverse to him he might appeal to the Supreme Court. The Judge thereupon refused to enter the motion and fined Mr. Ingersoll for contempt, and ordered him to his seat, saying that he had no right as an attorney or party to be heard in that Court. Mr. Ingersoll having been silenced, though not subdued, procured another attorney not under the ban to renew the motion, and the Judge again refused it, and threatened to fine that attorney also, and stated that he would not permit the correctness of that rule to be questioned, nor would he permit an entry of record from which an appeal could be taken. He also refused to sign any bill of exceptions setting out the proceedings. Mr. Ingersoll then presented his petition for mandamus to one of the Judges of this Court and an alternative writ issued to have the Judge spread on the minutes the proceedings, so that the same might be reviewed in this Court. Judge Howard entered his appearance and filed an answer setting out at great length his reasons for adopting the rule and for refusing to per-

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mit the petitioner's motion to be entered of record.

The answer went on to state, by way of explanation as to why he refused to allow petitioner's motion, and the proceedings to be entered of record as follows:

"To say that all the rules of the Circuit, Chancery, and Criminal Courts made for their own protection and for the dispatch of their own business and in accordance with the written law, are subject to revision in the Supreme Court, whenever any captious attorney sees proper to make a question upon them and carry them up to the Supreme Court, is just to destroy the inherent powers of the inferior tribunals and take from them all their dignity and all their rights of protecting themselves."

After filing his answer, Judge Howard permitted the proceedings to be spread of record and granted an appeal to Mr. Ingersoll.

The Court held that it was a proper case for writ of mandamus, but inasmuch as the record had been made and the case brought up by appeal and the Court itself had been abolished, the writ need not in fact be issued. It was held that the Court would not permit a trial Judge to refuse to make record of proceedings before him so as to prevent their review and revisal in this Court, and that such mode of preserving the inherent powers of inferior tribunals and pre-

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serving their dignity and protecting themselves was altogether novel and unsupported by law.

After considering the questions at some length the Court concluded that the Judge had no right to make or enforce the rule against Mr. Ingersoll, and the relief he asked for was granted to him and Judge Howard was taxed with the costs.

Now, in that case the refusal of the Judge of the Court below to have the proceedings spread upon the minutes so that an appeal could be had was the ground of mandamus. In the present case there was an entry made after the Court adjourned purporting to render a final judgment against Richards and a refusal to allow other entries to enable him to appeal. The result was the same in both cases—that is, the relator was prevented by the action of the Judge from having any opportunity to have his action properly reviewed, and the Court in that case, as in this, in aid of its appellate jurisdiction, issued a mandamus to remove the impediments in the way of its exercise of appellate functions.

It is proper to remark that the Ingersoll case is much stronger authority on the subject of the jurisdiction of this Court to grant mandamus than is the present, inasmuch as the petitioner, Ingersoll, in that case had no proceeding to review the action of the lower Court pending of any kind, but was asking the writ in the absence of any pending appeal or writ of error, while

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here the relator, Richards, did have a writ of error pending, and the mandamus was sought in aid of that proceeding, and in order that it might be brought properly before the appellate Court. The Court could see that the writ of error could not bring the merits of the case before this Court because of the unauthorized action of the defendant and the apparently regular but illegal entries on the minutes, and in aid of its appellate jurisdiction it issued the writ so as to enable the relator to properly prosecute his writ of error.

But returning to the matter of costs. It is evident that the costs of this proceeding should not be adjudged against the State in any event, nor in view of the relief granted the relator, should it be taxed to him, and the only question presented is whether the clerks and officers shall be required to do the services performed in the case, or whether it shall be taxed to the defendant. Now, if the Court could see that the disposition of this case involved the review of any judicial act of the petitioner—that is, an act done by him in term time and in a judicial manner, the insistence of defendant that he should not be taxed with costs would be tenable, but when the controversy involves an act of the petitioner as an individual out of Court and when it was not in session, then he is amenable to cost as well as any other individual litigant.

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The order of this Court is to the Hon. J. W. Sneed, as Judge of the Court, to enter a judgment setting aside an unwarranted act and the entry thereof upon the minutes of his Court by J. W. Sneed as an individual, so that he, as Judge, may proceed in a judicial manner to dispose of a case pending upon his docket and which in our view has not been finally disposed of. It is proper to add that all the questions of law now presented might have been presented on the original hearing, and especially should those have been presented which questioned the jurisdiction of this Court to entertain the mandamus proceeding.

We see no reason for setting aside our former action in this matter, and the petition to rehear is denied and dismissed.

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